Petition

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS

81-1872

No. 81-

In The
Supreme Court of the United States

October Term, 1981

TURF PARADISE, INC.,
AN ARIZONA CORPORATION,
Petitioner

vs.

ARIZONA DOWNS, AN
ARIZONA CORPORATION,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JON L. KYL
JEFFERSON L. LANKFORD
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Tel. (602) 262-5911
Attorneys for Petitioner

April 7, 1982

QUESTIONS PRESENTED

1. Does the Court of Appeals' ruling that the *per se* antitrust rule does not apply to a plainly anticompetitive market division, because it is accomplished by allocating racing dates rather than territories, conflict with this Court's decision in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972)?

2. Where the State regulates the Arizona racing industry generally, but neither regulates nor compels private anticompetitive conduct, does the Court of Appeals' grant of antitrust immunity to such conduct as "state action" conflict with this Court's decisions in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE FAILURE OF THE COURT OF APPEALS TO APPLY THE PER SE RULE TO PLAINLY ANTICOMPETITIVE HORIZONTAL MARKET DIVISION CONFLICTS WITH THE RULE OF *TOPCO*	7
II. BY GRANTING ANTITRUST IMMUNITY TO A PRIVATE PARTY WHOSE CONDUCT WAS NEITHER REGULATED NOR COMPELLED BY THE STATE, THE COURT OF APPEALS EXPANDED STATE ACTION IMMUNITY BEYOND THE NARROW LIMITS ESTABLISHED IN *GOLDFARB, CANTOR* and *MIDCAL*	12
CONCLUSION	16
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases *Page*

Arizona Downs v. Arizona Horsemen's Foundation, _____ Ariz. _____, 637 P.2d 1053 (1981) 11

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 6,10

California Retail Liquor Dealers Ass'n v. Midcal Aluminium, Inc., 445 U.S. 97 (1980) 5,6,12,13,14,15

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 4,6,12,13,14

Catalano, Inc. v. Target Sales, Inc., 605 F.2d 1097 (9th Cir. 1979), *rev'd per curiam* 446 U.S. 643, *rehearing denied* 448 U.S. 911 (1980) 6,9,10

City of Groton v. Connecticut Light & Power Co., 497 F.Supp. 1040 (D. Conn. 1980), *aff'd in part and rev'd in part on other grounds*, 662 F.2d 921 (2d Cir. 1981) 14

City of LaFayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 6,12,13

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 8

Goldfarb v. Virginia State Bar, 421 U.S. 773, *rehearing denied* 423 U.S. 886 (1975) 4,6,12,13,14

Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir.), *cert. denied* 421 U.S. 493 (1973) 8

Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, *rehearing denied* 618 F.2d 1389 (5th Cir.), *cert. denied sub. nom Woodlands Telecommunications Corp. v. Southwestern Bell Telephone Co.*, 449 U.S. 912 (1980) 15

TABLE OF AUTHORITIES

Cases	*Page*
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)	11,12
New York State Electric & Gas Corp. v. Federal Energy Regulatory Commission, 638 F.2d 388 (2d Cir. 1980)	15
Northern Pacific R. Co. v. United States, 356 U.S. 1 (1968)	7
Parker v. Brown, 317 U.S. 341 (1943)	3,13
Phonetele, Inc. v. American Telephone & Telegraph Co., _____ F.2d _____, 1981-2 Trade Cas. (CCH) ¶ 64,413 (9th Cir. Dec. 3, 1981)	14
Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3d Cir.), *cert. denied* 439 U.S. 966 (1978)	15
Sound, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324 (8th Cir. 1980)	15
State of Arizona v. Maricopa County Medical Society, 643 F.2d 553 (9th Cir.), *cert. granted* 450 U.S. 979 (1980)	9
United States v. Koppers Co., Inc., 625 F.2d 290 (2d Cir.), *cert. denied* _____ U.S. _____, 102 S.Ct. 639 (1981)	9
United States v. Southern Motor Carriers Rate Conference, 439 F.Supp. 29 (N.D. Ga. 1977)	15
United States v. Terminal R. Ass'n, 224 U.S. 383 (1912)	11
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	5,7,8,9,10
Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied* 404 U.S. 1047 (1972)	14

Statutes	*Page*
A.R.S. §5-108.01 (1956)	4
A.R.S. §5-110 (A)	3,4

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OPINIONS BELOW

The United States District Court for the District of Arizona filed no opinion in this case. That court filed an order dismissing the complaint dated January 29, 1980. (App. C).

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported. It is reproduced in the Appendix. (App. A).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 7, 1982, affirming the order of dismissal by the United States District Court for the District of Arizona dated January 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutory provisions involved are reprinted in their entirety in the Appendix. (App. G).

The statutory provisions are:

15 U.S.C. §§1, 15, 26
28 U.S.C. §§2201, 2202
A.R.S. §5-108.01 (1956)
A.R.S. §5-110(A)

STATEMENT OF THE CASE

This case involves the legality under the antitrust laws[1] of an agreement between two competitors to share the only horse racing facility in metropolitan Phoenix, Arizona, to divide racing dates at the track between them and to exclude others from the facility. Petitioner Turf Paradise, Inc. (hereafter "Turf") brought this action to invalidate the 1956 agreement (App. F) between Turf and its competitor, Arizona Downs (hereafter "Downs"), as an unreasonable restraint of trade.

The district court granted partial summary judgment to Downs, finding that the doctrine of *in pari delicto* barred an award of damages to Turf. (App. E). On cross-motions for summary judgment on the remaining declaratory and

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[1] This action was brought by Petitioner Turf Paradise, Inc. under the Sherman Act, 15 U.S.C. §1, the Clayton Act, 15 U.S.C. §§15, 26 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

injunctive issues, the district court found that the interest of Arizona in gambling exceeded any federal interest, and, therefore, decided to abstain. However, instead of abstaining, the court dismissed the action. (App. C).

The Court of Appeals affirmed the dismissal on other grounds. (App. A). Rejecting the absention doctrine as inapplicable, the court then held that the Downs-Turf agreement did not *per se* violate the antitrust laws. As an alternative holding, it found that Downs was exempt from antitrust strictures under the state action doctrine espoused in *Parker v. Brown*, 317 U.S. 341 (1943).

For more than two decades only Turf and Downs have offered racing meets in the Phoenix area, both conducting races at the facility built by Turf. They divide the racing season equally between them.[2] Thus, when Turf races, Downs does not; when Downs races, Turf does not. The horse racing market in Phoenix is thereby neatly divided, one half for each competitor. A third competitor seeks to share Turf's facility but is barred by the agreement. See note 7, *infra*.

The 1956 agreement allows Downs to share Turf's horse racing facility for twenty years, with two twenty-year renewals at Downs' option. Downs exercised its first renewal option in 1976, extending the agreement to 1996. A second option would extend the agreement to the year 2016. The agreement includes the following provisions relating to the allocation of racing dates between the two parties using Turf's track:

1. Each party may use the facility on the dates allocated "by authority of law";

2. The total number of dates available to both parties are divided equally, one-half to each;

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[2] The total number of racing days is established by A.R.S. § 5-110.

3. The parties will alternate the first half of the racing season between them;

4. Turf will not permit anyone else to conduct horse racing at its facility, and Downs will not use any other facility.

Turf attacks the second and third provisions of the agreement as a classic horizontal division of business, and thus as an antitrust violation *per se* or under the rule of reason.[3]

Although Arizona's horse racing industry is generally regulated by statute and the Arizona Racing Commission, the State does not control the sharing of Turf's facility or the allocation of racing dates between Turf and Downs. Thus, while the total number of racing days is limited by law, A.R.S. §5-110(A), the dates on which each operator races have been governed by the Downs-Turf agreement since 1956. At the time the agreement was signed, state law required applicants for conflicting dates to "attempt" to resolve the conflict by private agreement. A.R.S. §5-108.01 (1956). After Downs and Turf entered into their agreement, that provision was repealed and A.R.S. §5-110(A) was enacted. The latter statute required the Racing Commission

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[3] The Court of Appeals apparently believed that if Turf failed to establish a *per se* violation, Turf had no claim whatever; the court affirmed dismissal of Turf's complaint on the absence of *per se* violation. The state action exemption was only an "alternative" ground for dismissal. (App. at 14). But the *per se* rule is "complementary" to the rule of reason. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Turf obviously may pursue a rule of reason claim even if the Court of Appeals is correct that no *per se* violation exists. Thus, if Turf prevails on its contention below that Downs' conduct is not immunized by the state action doctrine, the Court of Appeals must be reversed even if it correctly held the *per se* rule inapplicable.

to award racing dates substantially as they were allotted in the preceding year and also accorded a "preference" to applicants who had agreed to allocate racing dates between themselves.

Judge Sneed's opinion for the Court of Appeals found that Arizona's general regulation of the horse racing industry satisfied the "active supervision" requirement for application of the state action exemption. It also held that a private party's conduct need not be compelled or required by the State to be immunized from antitrust scrutiny; Arizona's mere encouragement and approval of the conduct was enough. In doing so, the Court of Appeals admitted that many other federal courts have found a requirement of state compulsion in this Court's opinions in *Goldfarb v. Virginia State Bar* , 421 U.S. 773 (1975), *Cantor v. Detroit Edison Co* ., 428 U.S. 579 (1976) and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Court of Appeals nonetheless affirmed dismissal on the ground that Downs' conduct is immune from antitrust scrutiny as "state action."

The Court of Appeals also held that the *per se* rule of *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), is limited to "territorial" divisions of the market and is inapplicable to what it characterized as the "temporal" market allocation involved in this case. Thus, though the court agreede that the Downs-Turf agreement is one between competitors and is thus "horizontal," it held the agreement was not violative of the antitrust laws. The opinion also incorrectly speculates that antitrust relief might lead Turf to exclude Downs from Turf's track. The Court of Appeals feared that a "non-severability clause" in the agreement would eliminate Downs' right to use the facility as well as the allocation of racing dates. However, there is no such clause in the agreement.

SUMMARY OF ARGUMENT

I

The Court of Appeals declined to apply the *per se* rule to a plainly anticompetitive horizontal market division. If allowed to stand, the decision will drastically undercut *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) and conflict with the decisions of other circuit courts. *Topco* held that an agreement by competitors to divide a market territorially is a *per se* violation of the Sherman Act. The Court of Appeals held that a "temporal" market division is not within the *per se* rule.

The fact that the market division in this case was accomplished by allocating racing dates rather than territories makes it no less anticompetitive. Downs and Turf cannot compete with each other because they have agreed that only one of them will conduct races at a time. It makes no difference, under the rationale of *Topco*, whether they have eliminated competition by tearing in half a map (territorial allocation), a phone book (customer allocation) or a calendar ("temporal" allocation).

The Court of Appeals was concerned with the welfare of Downs should the agreement be voided by the antitrust laws. But those laws protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Even so, the Court of Appeals was concerned that Downs would lose its right to use Turf's facility under the agreement because a "non-severability" clause required that the entire agreement be voided if any portion was invalid. No such clause appears in the agreement, however.

The agreement does not foster competition, but eliminates it. Downs' use of the facility is not competitive because Turf has agreed not to conduct races while Downs does. The division of all of the racing dates by these two competitors also excludes other potential competitors from the only horse racing facility in the Phoenix area.

By refusing to apply the *per se* rule in a classic case of horizontal market allocation between competitors, and interpreting *Topco* as it did, the Court of Appeals created a dangerous and confusing precedent in conflict with decisions of other circuits and this Court's clear holdings in *Topco* and previous cases.

II

Two of the Circuit Judges decided that, "[s]hould we be in error in this respect," there was an alternative reason to affirm the lower court. They concluded that Arizona's general regulation of the horse racing industry protected the anticompetitive conduct as "state action." Although Arizona neither regulates nor compels the allocation of racing dates by private agreement, the court believed that neither was required for antitrust immunity.

This holding directly conflicts with this Court's decisions in *California Retail Liquor Dealers Ass's v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), *City of LaFayette v. Louisiana Power & Light Co.* 435 U.S. 389 (1978), *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). These cases stand for the proposition *inter alia* that private conduct must be compelled or required by the State to be immunized from antitrust scrutiny. The private conduct must also be "actively supervised" by the State to be immune. The State's mere encouragement or approval of the conduct is not enough. When private parties play a major role in the decision to engage in anticompetitive conduct, no state action exemption applies.

Yet Arizona did not compel Downs and Turf to agree to divide racing dates between themselves or exclude others from the facility. The allocation of dates is accomplished by private agreement which the State merely approves. While the State does regulate aspects of the horse racing industry, it does not actively supervise the allocation of racing dates by private agreement.

ARGUMENT

I. THE FAILURE OF THE COURT OF APPEALS TO APPLY THE PER SE RULE TO PLAINLY ANTICOMPETITIVE HORIZONTAL MARKET DIVISION CONFLICTS WITH THE RULE OF *TOPCO*.

The existence of certain categories of anticompetitive conduct which are *per se* violative of the antitrust laws is well-established:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1968).

In *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), this Court held that an agreement by competitiors to divide a market territorially is a *per se* violation of the Sherman Act. Topco was a cooperative corporation wholly owned by independent grocers who had agreed among themselves that they would not compete with each other within their respective market areas. Despite the fact that such a restriction actually enhanced the cooperative's competition against larger chain stores,[4] this Court held:

> We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation of §1. 405 U.S. at 608.

The Court of Appeals conceded that the Downs-Turf agreement was one between competitors. (App. at 13). However, it refused to apply the *per se* rule because it saw the agreement as a "temporal" market allocation unlike the "territorial" division in *Topco* and because it speculated that antitrust relief might not enhance competition. (App. at 13).

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[4] 405 U.S. at 605-606.

The characterization by the Court of Appeals of the parties' agreement as a "temporal allocation" unlike the "territorial allocation" involved in *Topco* is a distinction without a difference and an unduly restrictive reading of *Topco*. This Court held in *Topco:*

> We also strike down Topco's other restrictions on the right of its members to wholesale goods. These restrictions amount to regulation of the customers to whom members of Topco may sell Topco-brand goods. 405 U.S. at 612.

In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 46 (1977) this Court observed that "the fact that one restriction [is] addressed to territory and the other to customers is irrelevant to functional anti-trust analysis. . . ." And in defining the *per se* rule against horizontal market division, the other Courts of Appeals have not read *Topco* as limiting the doctrine to geographically-based divisions. *E.g., Hobart Brothers Co. v. Malcom T. Gilliland, Inc.*, 471 F.2d 894, 899 n.1 (5th Cir.), *cert. denied* 412 U.S. 493 (1973) *(Topco* makes "very clear . . . that a horizontal allocation of *markets* . . . is a *per se* violation . . .") (emphasis added); *see also United States v. Koppers Co., Inc.*, 652 F.2d 290 (2d Cir.), *cert denied* ____ U.S. ____, 102 S.Ct. 639 (1981) (approving jury instruction that allocation of customers is *per se* violation).

That federal courts should not read the categories of *per se* violations too narrowly was one of the lessons of *Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097 (9th Cir. 1979), *rev'd per curiam* 446 U.S. 643, *rehearing denied* 448 U.S. 911 (1980). In that case, the Court of Appeals (in another opinion by Judge Sneed[5] found that anticompetitive conduct might be justified by some pro-competitive effects and therefore was not a *per se* violation. This Court re-

[5] *See also State of Arizona v. Maricopa County Medical Society*, 643 F.2d 553 (9th Cir.), *cert. granted* 450 U.S. 979 (1980). In that case, again in an opinion by Judge Sneed, the Court of Appeals declined to apply the *per se* rule to alleged price-fixing by physicians.

versed, holding that the competitors' agreement to fix credit terms fell within the *per se* prohibition of price-fixing because it was "plainly anticompetitive." 446 U.S. at 645. Speculation of the Court of Appeals that the credit scheme might have some redeeming virtue was flatly rejected:

> [W]hen a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*. 446 U.S. at 649.

The fact that the scheme was clothed as an agreement on credit terms made it no less a *per se* price-fixing violation. This Court found that "[o]ur cases fully support" the reasoning that "the agreement was just as plainly anticompetitive as a direct agreement to raise prices." 446 U.S. at 645-646.

Likewise the "plainly anticompetitive" effect in *Topco* which warranted *per se* status was not the mere drawing of territorial boundary lines, but the *consequences* of such a market division on the grocers' freedom to compete. 405 U.S. at 611-612. The characterization of the Downs-Turf agreement as "temporal" does not establish a less harmful or less obvious effect on competition. Downs and Turf simply cannot compete with each other for racing entrants and

patrons so long as only one conducts races at a time.[6] It makes no difference whether they accomplished the market division by dividing territories, customers or dates on which business is conducted; the division of markets among competitors is plainly anticompetitive and squarely within the *per se* rule.

The Court of Appeals also rejected the *per se* rule because it speculated that Turf's "purpose in this case is to increase its control over the racing facility," and that relief from the agreement might lead to the exclusion of Downs from the use of Turf's facility. (App. at 14). This speculation is both an irrelevant analysis in a *per se* case and inaccurate as a matter of fact.

The argument is the analog of the argument rejected in *Catalano*. When a restraint of trade is plainly anticompetitive, the possibility it may be "harmless in a particular case" is irrelevant. 100 S.Ct. at 1928. If conduct fits within a *per se* category, it violates the Sherman Act "without regard to a consideration of [its] reasonableness." *Topco*, 405 U.S. at 607.

The court's concern with Downs' welfare is not a proper inquiry in an antitrust case in any event. "Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*. . . ." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original). "The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic ar-

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[6] Downs and Turf have agreed to rigidly divide the available racing dates equally between them regardless of the effect on racing. Whether one would be better able to serve the public and generate revenue for the State, or whether a third competitor could better do so, is irrelevant under the agreement. Because the dates are guaranteed under the agreement, Turf and Downs do not have to compete with each other for a share of the market.

rangements will better promote trade and commerce than competition... That kind of argument is properly addressed to Congress. ..." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689 (1978).

The factual basis of the analysis of the Court of Appeals is also incorrect. The court contended that Downs could not use the facility if the date allocations provision of the agreement were stricken, "because ... the non-severability clause of the lease" would invalidate the rest of the agreement including Downs' right to share Turf's facility. (App. at 13). Apparently, the Court misread the record because no "non-severability" clause exists. ("Agreement," App. F; *see also Arizona Downs v. Arizona Horsemen's Foundation*, ____ Ariz. ____, 637 P.2d 1053 (1981) (holding that a provision of the agreement is severable)).

The agreement does not foster competition. First, Downs' use of the facility is not competitive since Turf has agreed not to conduct racing while Downs does so. Second, other potential competitors are prevented from using the facility because all of the dates have been divided by agreement between Downs and Turf.[7] Turf stands ready to share its facility with all entities receiving racing dates from the Commission. Reporter's Transcript of Oct. 1, 1979 at 14-15. Permitting the Downs-Turf agreement to control the allocation of dates does not merely preserve Downs' position in a competitive marketplace; it guarantees Downs a complete monopoly of a one-half slice of the market.

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[7] The existence of potential competition is not hypothetical. Arizona Horsemen's Foundation seeks to conduct racing at Turf's facility. Reporter's Transcript of Jan. 28, 1980 at 33. As the Court of Appeals recognized, the federal antitrust laws prohibit exclusion of Arizona Horsemen's by Turf and Downs from "a facility necessary to conduct horse racing." (App. at 13-14); *see United States v. Terminal R. Ass'n*, 224 U.S. 383 (1912) (exclusion of competitors from an essential facility violates the Sherman Act).

The holding of the Court of Appeals that the *per se* rule is inapplicable is in apparent conflict with this Court's analysis of the rule and the interpretation of other circuits. Moreover, if it is allowed to stand, the holding will severely restrict this important tool of antitrust enforcement. The issue is important and substantial. This Court's review is therefore necessary and proper.

II. BY GRANTING ANTITRUST IMMUNITY TO A PRIVATE PARTY WHOSE CONDUCT WAS NEITHER REGULATED NOR COMPELLED BY THE STATE, THE COURT OF APPEALS EXPANDED STATE ACTION IMMUNITY BEYOND THE NARROW LIMITS ESTABLISHED IN *GOLDFARB, CANTOR* AND *MIDCAL.*

The conditions for application of the state action exemption are set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105, quoting *City of Lafayette*, 435 U.S. at 410.

In *Midcal, City of Lafayette, Goldfarb v. Virginia State Bar*, 421 U.S. 773, *rehearing denied* 423 U.S. 886 (1975) and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), this Court has stated that private conduct merely encouraged or approved by the state is not actively supervised and thus is not immunized as "state action" unless it is compelled or required by the State. In *Goldfarb*, the Court held the doctrine inapplicable to protect minimum fee schedules for legal services because state law did not compel establishment of the schedules. 421 U.S. at 790.

In a portion of the plurality opinion in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), in which the Chief Justice also concurred, Justice Stevens wrote:[5]

> The Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. 428 U.S. at 592-593.

In *City of Lafayette*, the court traced the compulsion requirement to *Parker v. Brown*, 317 U.S. 341 (1943), which "repeatedly emphasized that the anticompetitive effects . . . derived from 'the state['s] command.' " 435 U.S. at 409, quoting 317 U.S. at 352.

In *Midcal* this Court quoted *Goldfarb* and described *Cantor* as follows:

> "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." [*Goldfarb*, 421 U.S.] at 791 . . . Similarly, in *Cantor* . . ., a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. 445 U.S. at 104.

The Court of Appeals expressly declined to give any weight to the fact that instead of *compelling* the parties to allocate racing dates privately, Arizona merely *permitted and approved* their allocation agreements. (App. at 17 n. 8). That the actual allocation of racing dates was made by "private decision making" was also of no consequence, *id.*, although the "mixture of private and public decisionmaking" was fatal to Detroit Edison's claim in *Cantor* of immunity for its program to distribute light bulbs. 428 U.S. at 593. The court ignored the fact that while Arizona's Racing Commission actively regulates wagering and applications for permits to conduct horse races, the decision

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[5] Curiously, the Court of Appeals found "further support for our view that compulsion is not required" in Justice Stevens' opinion in *Cantor*. (App. at 17 n. 8).

to divide among permittees the actual dates of racing is made by the permittees themselves and merely approved by the State.

The court believed that Arizona's "integrated regulatory scheme" in the horse racing industry shows its "active supervision." (App. at 21). But Virginia's general regulation of attorney conduct, Michigan's regulation of public utilities, and California's comprehensive regulation of alcoholic products did not immunize specific anticompetitive conduct in fixing attorneys fees, distributing electric light bulbs or fixing the prices of alcoholic products in *Goldfarb, Cantor* and *Midcal*. Similarly, Arizona's general regulation of horse racing hardly justifies immunity for unregulated, anticompetitive conduct allocating racing dates. Other federal courts recognize that the existence of some regulation does not immunize all private conduct in the regulated industry.[9] *E.g., Woods Exploration & Producing Co. v. Aluminium Co. of America*, 438 F.2d 1286, 1302 (5th Cir. 1971), *cert. denied* 404 U.S. 1047 (1972) ("The district court's opinion seemed to imply that because of extensive regulation the oil and gas industry is not susceptible to the strictures of the antitrust laws. We cannot agree . . ."); *City of Groton v. Connecticut Light & Power Co.* 497 F.Supp. 1040, 1050 (D. Conn. 1980) *aff'd in part and rev'd in part on other grounds*, 662 F.2d 921 (2d Cir. 1981); *United*

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[9] Another panel of the Ninth Circuit recently recognized the principle in *Phonetele, Inc. v. American Telephone & Telegraph Co.*, _____ F.2d _____, 1981-2 Trade Cas. (CCH) ¶ 64,413 (9th Cir. Dec. 3, 1981). "Antitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct."

States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 41 (N.D. Ga. 1977).

Arizona does no more to regulate the allocation of horse racing dates than California did to regulate liquor prices or Michigan did to regulate the distribution of light bulbs. "The national policy in favor of competiton cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially" a horizontal allocation of the market. *Midcal*, 445 U.S. at 106.

The Court of Appeals admitted that "other courts have found a 'compulsion' requirement" in *Goldfarb, Cantor* and *Midcal*. (App. at 17 n. 8). The fact is that the holding in this case directly conflicts with decisions by the other Courts of Appeals that state complusion is indispensable to antitrust exemption of private conduct. *E.g, Sound, Inc. v. American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980); *New York State Electric & Gas Corp. v. Federal Energy Regulatory Commission*, 638 F.2d 388 (2d Cir. 1980); *Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, *rehearing denied* 618 F.2d 1389 (5th Cir.), *cert. denied sub. nom Woodlands Telecommunications Corp. v. Southwestern Bell Telephone Co.*, 449 U.S. 912 (1980); *see also Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir.), *cert. denied* 439 U.S. 966 (1978) (requiring compulsion unless the State and defendant are closely related entities).

The court's analysis was not based on the test for state action immunity as announced in *Goldfarb, Cantor* and *Midcal*. Instead, the court devised its own, more lenient test, which if allowed to stand, will result in far broader immunity from antitrust scrutiny than this Court's decisions permit. The drastic undercutting of the antitrust laws by the court's liberal grant of immunity and the inter-circuit conflict are substantial and important reasons for this Court to review the Ninth Circuit's decision.

CONCLUSION

Unless reviewed and corrected by this Court, the decision of the Circuit Court will stand as an incorrect statement of two important antitrust principles. To avoid the error, conflicting precedent and confusion which would result, this petition for writ of certiorari should be granted.

The Court of Appeals has persistently refused to apply the correct *per se* rule analysis, finding that concern for the well-being of a competitor rather than the competitive health of the market is controlling, and deciding that a plainly anticompetitive horizontal division of the market is not *per se* unreasonable so long as it is not accomplished by geographic line-drawing. And by affirming dismissal because of the absence of a *per se* violation, the court improperly denied Turf the opportunity to prove a violation under the rule of reason.

The Court of Appeals has also improperly extended the doctrine of state action immunity to virtually any private conduct in a regulated industry, thus going far beyond this Court's decisions (and those of other circuits) conditioning immunity on state compulsion of the anticompetitive conduct, a factor plainly absent in this case.

For these reasons, Petitioner Turf Paradise, Inc. respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

JON L. KYL
JEFFERSON L. LANKFORD
JENNINGS, STROUSS & SALMON
111 W. Monroe
Phoenix, Arizona 85003
Tel. (602) 262-5911
Attorneys for Petitioner

Appendix

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

		Page
Appendix A	Opinion of the Court of Appeals	A-1
Appendix B	Order of the Court of Appeals	A-16
Appendix C	Order of the District Court (January 29, 1980)	A-18
Appendix D	Order of the District Court (October 2, 1979)	A-20
Appendix E	Order of the District Court (November 16, 1979)	A-22
Appendix F	Agreement	A-24
Appendix G	Statutes Involved	A-38

Filed Jan. 7, 1982 Clerk, U.S. Court of Appeals

TURF PARADISE, INC., an Arizona corporation, Plaintiff-Appellant,

v.

ARIZONA DOWNS, an Arizona corporation, Defendant-Appellee.

No. 80-5185.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 12, 1981.

Decided Jan. 7, 1982.

Appeal from the United States District Court for the District of Arizona.

Before WRIGHT, SNEED, and POOLE, Circuit Judges.

SNEED, Circuit Judge:

Turf Paradise, Inc. (Turf), an Arizona corporation that owns and operates the Turf Paradise race track in Phoenix, Arizona, filed this private antitrust action against Arizona Downs (Downs), an Arizona corporation that leases and operates the Turf Paradise track for half of the racing season, alleging violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and section 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. Turf contended that a provision of the lease between Turf and Downs that sets forth the manner in which Turf and Downs will apply to the Arizona Racing Commission for racing dates is a horizontal restraint of trade among competitors and, consequently, a *per se* violation of the federal antitrust laws. Turf sought declaratory and injunctive relief, as well as damages, costs, and attorney's fees.

The district court on November 16, 1979 granted Downs' motion for partial summary judgment finding that Turf, as an original participant to the two-party agreement, was barred from receiving damages under the defense of *in pari delicto*. On the same date the district court denied Turf's motion for partial summary judgment which sought to have declared the date allocation provisions in the lease void as a

declared the date allocation provisions in the lease void as a *per se* violation of the Sherman Act. Thereafter, on January 28, 1980, the district court invoked the abstention doctrine and dismissed the action in deference to a prior filed state action brought by the Arizona Horsemen's Foundation, Inc. (AHF), challenging the same lease on the grounds that the exclusivity clause of the lease violates the Arizona antitrust laws, and that the preferences given existing holders of racing permits under Arizona law violates equal protection. The district court's dismissal of January 29, 1980 can be read as also relying upon the antitrust immunity provided by *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Turf timely appeals both the grant of partial summary judgment and the dismissal.

We affirm both actions of the district court on grounds somewhat different than those articulated by that court. That is, we hold that the date allocation provisions are not a *per se* violation of the Sherman Act and that, should we be in error in this respect, the provisions are immune from attack under *Parker v. Brown, supra*. In so holding, we reject the contentions of Downs that the district court lacked subject matter jurisdiction and that, if jurisdiction existed, the district court properly abstained from exercising it. We refrain from deciding other issues raised by the parties.

I.

STATEMENT OF THE CASE

Turf and Downs have both been engaged in the business of conducting horse racing meetings in Maricopa County, Arizona for a number of years. Prior to 1954 both Turf and Downs (then operating under its predecessor name of Ingleside Turf Club) each had its own race track. At the time Turf was planning to build a new track and Downs was planning to enlarge its existing facility. In 1954 both parties applied to the Arizona Racing Commission for permits to hold racing meetings on some of the same days, thus resulting in a conflict that the Arizona Racing Commission was going to have to resolve. Litigation resulted from this con-

flict. On September 20, 1954, Turf wrote to Downs suggesting that "a direct conflict in racing dates exist[ed and that that resulted in a condition that was] very detrimental to the better interests of racing and [could] only lead to confusion and an inferior type of horse racing." In order to avoid "this undesirable situation," Turf proposed that Turf and Downs divide use of Turf's soon to be completed race track—the present Turf Paradise facility. A copy of this letter was delivered to the Arizona Racing Commission.

In 1956 the Arizona Legislature enacted Ariz.Rev.Stat. § 5-108.01, effective July 14, 1956, that provided a regulatory method for settling conflicts in applications for racing dates within the same county. It defined a conflict as any time "two or more applications [seek] racing permits to conduct racing on the same day or dates within the same county." Ariz.Rev.Stat. § 5-108.01(A). It further provided that when a conflict existed, "applicants shall attempt to resolve such conflict by an agreement in writing in which agreement each such applicant shall receive and be allocated dates in such manner as will eliminate such conflict." Ariz.Rev.Stat. § 5-108.01(B). Such agreements were to be filed with the Arizona Racing Commission and the Commission would hold hearings to allocate the days only in the event that an agreement could not be reached. Ariz.Rev.Stat. § 5-108.01(B) & (C).

On October 9, 1956, after the effective date of section 5-108.01, Turf and Downs signed a twenty-year lease, granting a leasehold interest to Downs for use of the Turf Paradise track for one-half of the racing season. The lease also contained two twenty-year option periods, the first of which was exercised by Downs in 1976. The lease contains the following provision that is the subject of the present controversy:

> The parties hereto recognize that heretofore the total racing dates legally available to the parties hereto have been applied for and allocated substantially equally

between [Turf] and [Downs], or the (sic) predecessors. The parties hereto agree that during the term of this agreement the total number of racing dates legally available to the parties hereto in a racing season shall be divided equally, one-half (½) thereof to [Turf] and one-half (½) thereof to [Downs]. The term "racing season" as used herein means that period of time beginning with the first day allocated by the Arizona Racing Commission at its meeting each year for horse racing at [Turf's] racing plant and ending with the last day so allocated.

The parties hereto agree that unless they otherwise mutually agree, they will alternate each year in applying for the racing days in the first hald and in the last half of each racing season, with [Turf] to apply only for the racing days in the first half of the next racing season beginning after July 1, 1957, and [Downs] to apply only for the racing days in the last half of said racing season.

The 1956 version of section 5-108.01 dealing with conflicts in racing dates was repealed in 1968. Section 5-110(A) was adopted to replace it and provided that when a conflict existed, current holders of permits would be given preference for those dates they had had permits for in previous years. It specifically recognized that if there was an agreement among different applicants calling for them to alternate racing dates, the holders of permits would receive preference over other applicants in accordance with the alternating provisions of the agreement. Ariz.Rev.Stat. § 5-110(A) (West 1974 & Supp. 1980-81).

Aside from the above-mentioned statutory provisions, horse racing is subject to considerable regulation in Arizona. The Arizona Racing Commission is empowered to, *inter alia*, issue racing dates, regulate and supervise all racing meetings, inspect racing sites, promulgate regulations governing racing meetings to promote "public health, safety, and proper conduct of racing and pari-mutuel wagering," and supervise pari-mutuel racing. Ariz.Rev.Stat.

§ 5-104 (West 1974 & Supp. 1980-81). Permit applications must include a statement of the location at which and dates on which the racing meetings are to be held, as well as a statement as to whether the plant is leased or owned. Ariz.Rev.Stat. § 5-107 (West 1974 & Supp. 1980-81). A permit is necessary to hold a racing meeting, and a permit will only be issued to an owner or a lessee of a racing track. Ariz.Rev.Stat. §§ 5-107.01 and 5-107.02 (West 1974 & Supp. 1980-81). The Commission is required to "conduct a thorough investigation concerning an application for a permit," and may refuse to issue a permit if such refusal is warranted based on a review of the applicant's moral character, if issuing the permit is not in the "best interest of the safety, welfare, economy, health and peace of the people of the state," or for other enumerated reasons. Ariz.Rev.Stat. § 5-108 (West 1974 & Supp. 1980-81). However, if the applicant meets the requirements for the issuance of a permit, it shall be issued. Ariz.Rev.Stat. § 5-108(C) (West 1974 & Supp. 1980-81). No new racing permits shall be issued after February 1, 1971 unless the Commission determines that issuance of the permit is in the public interest, is economically feasible, and in the best interest of horse racing. Ariz.Rev.Stat. § 5-108.01 (West 1974 & Supp. 1980-81). All challenges to the issuance, or failure to issue, a new permit are to be made in the Superior Court of Maricopa County. Ariz.Rev.Stat. § 5-108.01(B) (West 1974 & Supp. 1980-81). Finally, both the number of permits that a single entity can own in the state and in the largest counties are limited, and the number of racing days allowed in a particular year, are limited. Ariz.Rev.Stat. §§ 5-108.03 and 5-110(A) (West 1974 & Supp. 1980-81). In Maricopa County the number of available race days is currently 150.

A third racing entity, AHF, has applied to the Commission for a permit to conduct racing meetings at the Turf Paradise track on those days for which the track is now leased to Downs. AHF, as already noted, filed a state court action, prior to the filing of the instant action, claiming state antitrust violations resulting from the current lease

agreement between Turf and Downs because of the exclusivity provisions of the lease, as well as a constitutional challenge to the preference provisions of section 5-110(A).[1] Turf and AHF have also submitted to the Commission a proposed five-year lease between Turf and AHF, which contains more favorable financial terms for Turf than does the current lease with Downs, but does not contain a specific requirement that Turf and AHF apply for specific days. Rather, they agree to lease the plant to AHF for those days that the Commission awards it a permit to conduct racing meets. Turf would be under no obligation to enter into a new lease with AHF at the end of the five-year period.

II.

DISTRICT COURT JURISDICTION—INTERSTATE COMMERCE

Downs contends that the district court lacked subject matter jurisdicition over the antitrust claims because the "conduct complained of" does not "affect" interstate commerce. We disagree.

[1, 2] The interstate commerce requirement may be satisfied under either the "in commerce" theory or the "effect on commerce" theory. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242, 100 S.Ct. 502, 509, 62 L.Ed.2d 441 (1980). The present action easily satisfies the "effect on commerce" test. To meet the "effect on commerce" test, Turf need only allege that the local activity of horseracing has a substantial effect on interstate commerce, not the "more particularized showing" that the alleged illegal conduct, the lease provision, has a substantial effect on

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[1] The Arizona Supreme Court's decision in the state case was filed after oral argument. That court held the lease agreement did not run afoul of the state antitrust law because it had been specifically authorized by the Arizona Legislature and the authorization was not unconstitutional. *Arizona Downs v. Arizona Horsemen's Foundation*, No. C-371759, 130 Ariz. __, __ P.2d __ (Ariz., filed Dec. 8, 1981).

interstate commerce. *McLain*, 444 U.S. at 242-43, 100 S.Ct. at 509-510. *Accord, Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823 at 827 (9th Cir., 1981); *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289 at 1291 (9th Cir., 1981); *Western Waste Service v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.), *cert. denied*, 449 U.S. 869, 101 S.Ct. 205, 66 L.Ed.2d 88 (1980). *But see Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 721-24 & n.3 (10th Cir. 1980) (en banc) (disagreeing with *Western Waste Service's* interpretation of *McLain* that the conduct need not affect interstate commerce).[2] There must be a "sufficient nexus" between the activity and interstate commerce so that it can be said "as a practical matter of economics" there is "a not insubstantial effect on the line of commerce involved." *Community Builders*, 652 F.2d at 827 (citing *McLain*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441).

[3] The "sufficient nexus" exists. Affidavits in the record disclose at a minimum that (1) approximately 50% of the owners and trainers at the track are non-residents, (2) more than 40% of the horses stabled at the track are from out-of-state, (3) more than 40% of the patrons are non-residents, (4) over two-thirds of the jockeys are out-of-state residents, (5) the food and beverage concessionaires at the track, a Delaware corporation, has had sales of more than $1,500,000 per year, and (6) numerous other companies that provide contractual services to the track are foreign corporations. These facts have never been challenged by Downs. These facts establish the requisite nexus and distinguish this case from *Thornhill Publishing Co., Inc. v. General Telephone & Electronics*, 594 F.2d 730 (9th Cir. 1978), where only conclusory and non-specific affidavits were

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[2] As the Supreme Court noted in *McLain*, to accept Downs' argument would mean that failure of an alleged restraint to succeed would bar an action. 444 U.S. at 243, 100 S.Ct. at 509-510. Because the Sherman Act bases liability on proof of either "an unlawful purpose" or "an anticompetitive effect," such cannot be the jurisdictional test. *Id.* Rather, success of an illegal restraint would only affect the measure of damages.

filed. *See Community Builders*, 652 F.2d at 827-828. Consequently, the district court had jurisdiction over the action. It is not necessary to determine if the action also satisfies the "in commerce" test.

III.

ABSTENTION

The district court appears to have dismissed the action on abstention grounds. After noting that the merits of the case were intertwined with the issue of legalized gambling, that there is extensive state regulation of horse racing in Arizona, that Arizona had a greater interest in the controversy than did the federal government, and that resolution of a prior filed state action might dispose of the instant case, the district court stated that "[t]he proper course for the Court to take in this action is to abstain from further consideration of the matter. *See County of of (sic) Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060 [3 L.Ed.2d 1163] (1959)."

[4-6] Although a stay of the proceedings, rather than dismissal, is the normal result of a decision to abstain, in unusual situations dismissal may be appropriate. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818-19, 96 S.Ct. 1236, 1246-1247, 47 L.Ed.2d 483 (1976); *International Brotherhood of Electrical Workers, Local Union No. 1245 v. Public Service Commission*, 614 F.2d 206, 213 (9th Cir. 1980); *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979). Abstention, however, is an "extraordinary and narrow exception" that will normally be appropriate only when the consequences of exercising jurisdiction clearly outweigh the obligation to adjudicate suits over which the federal courts have jurisdiction, and dismissal is warranted only by the "clearest of justifications." *Colorado River*, 424 U.S. at 813, 817-19, 96 S.Ct. at 1244,

1246-1247; *Tovar*, 609 F.2d at 1293. Because it involves the discretionary exercise of a court's equity powers, it is reviewed only for an abuse of discretion. *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980).

[7] There are three general categories of abstention, as well as a fourth category that is closely related to abstention, but is not, properly speaking, a type of abstention. The first, *Pullman* abstention, is not appropriate here because no federal constitutional issue would be avoided by deferring to the state court action inasmuch as no federal constitutional issue is presented in this case. *See Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. at 189), 79 S.Ct. at 1063; *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *L. H. v. Jamieson*, 643 F.2d 1351 (9th Cir. 1981); *Pue v. Sillas*, 632 F.2d at 78-81; *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980).

[8] The second, *Younger* abstention,[3] is likewise not appropriate because a decision on the federal antitrust claims would neither "restrain" any state court proceeding, nor interfere in any way with the resolution of the issues presented in the prior filed state court action.

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[3] Strictly speaking, *Younger* abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction is being invoked for the purpose of restraining a state criminal proceeding. *Colorado River*, 424 U.S. at 816, 96 S.Ct. at 1245; *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). It has subsequently been expanded to include some civil proceedings, *e.g.*, state nuisance proceedings antecedent to a criminal prosecution for exhibiting obscene films, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); collection of state taxes, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); attempt to restrain a receivership imposed in an ongoing state court proceeding, *Worldwide Church of God, Inc. v. California*, 623 F.2d 613, 615 (9th Cir. 1980). In essence, concerns of federalism and comity compel a party to exhaust their state court remedies before seeking federal relief. *Worldwide Church of God*, 623 F.2d at 615.

[9] The third, *Burford* abstention, is equally inapplicable. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); *International Brotherhood of Electrical Workers*, 614 F.2d at 208-12. The purpose of *Burford* abstention is to avoid "federal intrusion into matters which are largely of local concern and which are within the special competence of local courts." *International Brotherhood of Electrical Workers*, 614 F.2d at 212 n.1.

It is likely that the district court had *Burford* abstention in mind when it dismissed the present action. The district court referred to the extensive state regulatory system of horse racing and to the paramount nature of the state's interest in gambling. Also, as in *Burford*, Arizona has concentrated challenges to the denial of permits in the Superior Court of Maricopa County, presumably to allow for a development of special competence in that court. *Cf. International Brotherhood of Electrical Workers*, 614 F.2d at 210 (failure to concentrate challenges to the Public Service Commission's authority in a single court was cited as a factor arguing against *Burford* abstention). Nonetheless, as in *International Brotherhood of Electrical Workers*, the federal issues are separable from the state issues.

[10, 11] While it is possible that the exercise of federal jurisdiction over the federal antitrust claims might lead to a result in conflict with that of a state court decision on the state antitrust claims, the mere "potential" for such conflicts does not require abstention. *Colorado River*, 424 U.S. at 815-16, 96 S.Ct. at 1245-1246. The key question is whether the potential conflict would impermissibly impair the state's effort to effect its policy with respect to horse racing and gambling. *Id.* at 816, 96 S.Ct. at 1245-1246. Here, success on the federal antitrust claim by Turf might remove Downs as a competitor as a result of voiding the

lease, but that would neither affect the availability of the Turf Paradise race tract for horse racing, nor impermissibly obstruct the regulation of gambling by the Arizona Racing Commission.[4]

[12] The fourth category, the close relative of abstention, may be referred to as the "wise judicial administration" exception to the exercise of jurisdiction, *See Colorado River*, 424 U.S. at 817-18, 96 S.Ct. at 1246-1247; *Tovar v. Billmeyer*, 609 F.2d 1293. Under this exception, a federal court will defer to a state court when failure to do so would waste judicial resources.[5] The exception is invoked when both the federal and state courts have concurrent jurisdiction over particular claims.

[13] It is inapplicable in the present case. There is no concurrent state and federal jurisdiction over the federal antitrust claims. The federal courts have exclusive jurisdiction over federal antitrust claims. 15 U.S.C. § 15.[6] Consequently, the dismissal of the action on abstention grounds was improper. The district court abused its discretion by invoking

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[4] Indeed, it is entirely possible that the Commission could effectively force Turf to rent the track to another party should it deem it preferable to have another entity operate the track some of the time by simply denying Turf a permit to race on those days now reserved for Downs. Alternatively, there is nothing theoretically stopping Downs from building its own track in Maricopa County and applying again to the Commission for racing permits. Moreover, it is arguable that the application of *Burford* abstention is particularly inappropriate in the context of a federal antitrust claim.

[5] This exception is distinct from *Pullman*, *Younger*, or *Burford* abstention, and the circumstances in which it is appropriate are considerably more limited. *Tovar*, 609 F.2d at 1293 (citing *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246-1247).

[6] *Cf. Weiner v. Shearson, Hammill & Co., Inc.*, 521 F.2d 817, 821-22 & n. 22 (9th Cir. 1975) (noting that normally abstention would be inappropriate when the federal court has exclusive jurisdiction over federal securities claims, but that when such claims are also pleaded as affirmative defenses to an otherwise identical state action, abstention might be appropriate because the state court could decide the federal securities issues).

abstention. The factors necessary to invoke abstention were not present. *See Pue*, 632 F.2d at 78.

IV.

DATE ALLOCATION PROVISIONS NOT A PER SE VIOLATION

[14] Although the district court did not decide whether the date allocation provisions of the lease were a *per se* violation of the Sherman Act, the issue was fully briefed and argued before the district court as well as before this court. This court often invokes its discretion to affirm on any ground supported by the record, e. g., *United States v. County of Humboldt*, 628 F.2d 549, 551 (9th Cir. 1980), and the Supreme Court has recognized that "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (citing *Turner v. City of Memphis*, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762 (1962)).

Because of these authorities and the thoroughness of the presentation of the positions of the respective parties, we address the crucial issue in this case. That issue is, were the date allocation provisions *per se* violations of the Sherman Act?

[15] To support its position, Turf relies primarily on *United States v. Topco Associates*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), in which it was held that "horizontal restraints" between competitors at the same level of the market structure to allocate market territories were *per se* violations of the Sherman Act without regard to their reasonableness. The issue is whether the date allocation provisions constitute such a "horizontal restraint." We hold that they do not.

We acknowledge, of course, that Turf and Downs are competitors at the same level of the market structure. The date allocation provisions, however, do not achieve a territorial allocation between competitors, at least some of whom could, but for the agreement, operate simultaneously within that area to which another is given exclusive rights. Rather, the date allocation provisions achieve a temporal allocation to a competitor of the use of a facility owned by another competitor under circumstances in which it is not possible to have simultaneous use by both. To strike down a territorial allocation manifestly promotes competition, at least among the competitors who are parties to the agreement, while to strike down the temporal allocation under the circumstances of this case does not clearly promote competition. Counsel for Turf in the hearings before the district court acknowledged that elimination of the date allocations provisions could lead to invalidation of the entire lease because of the non-severability clause of the lease. Reporter's Transcript, Vol. 2, at 38-42, 74. As a consequence, Turf could exclude Downs, as well as all others, from the use of the track except on terms acceptable to it. to employ a *per se* rule to foster increased control by Turf of a facility, access to which is necessary, at least in the short run, to conduct racing in the Phoenix metropolitan area, is a somewhat unusual way to promote competition.

To focus on the extent to which Turf's argument, if accepted, would increase Turf's power with respect to a facility necessary to conduct horseracing helps to clarify the proper manner in which this case should be regarded for antitrust purposes. The issue, properly speaking, is whether an agreement between competitors at the same level of the market structure to share temporally the use of a facility necessary to the conduct of their business is a *per se* violation of the Sherman Act. So far as we have been able to discover it has never been held to be so.

It is true, as *United States v. Terminal R. Ass'n*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), and other cases indicate, *e.g.*, *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir. 1952); *see also Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C.Cir.1977); *United States v. Standard Oil Co.*, 362 F.Supp. 1331 (N.D.Cal.1972), *aff'd*, 412 U.S. 924, 93 S.Ct. 2750, 37 L.Ed.2d 152 (1973), that the sharing of an essential facility by two or more competitors accompanied by the exclusion of all other competitors may amount to a violation of the Sherman Act. Leaving aside the question whether a competitor who in fact shares the essential facility has standing to attack the arrangement, of which it is a beneficiary, on behalf of the excluded competitors, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 211 (3d Cir. 1980), it is clear that Turf makes no such argument here. Its purpose in this case is to increase its control over the racing facility, not to increase the extent to which all competitors share in the use of the facility. We express no opinion concerning the extent to which such an argument properly presented might be meritorious.

V.

STATE ACTION IMMUNITY

As an alternative to our holding in Part IV of this opinion, we hold that the date allocation provisions of the lease are immune from the reach of the antitrust laws under the doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

[16] The doctrine of *Parker v. Brown* which provides that parties who act under the direction of a state government should not be liable under federal antitrust laws, is premised on the view that the Sherman Act was not intended to prohibit state regulation of business. Thus, action taken pursuant to a program administered in detail by the state itself is not an unreasonable restraint of trade. 317

U.S. at 352, 63 S.Ct. at 314. *Accord, Community Builders*, 652 F.2d at 828.[7]

The Supreme Court established two conditions that must exist before the exemption can apply: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Liquor Dealers v. Midcal Aluminum Co.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980) (quoting *City of LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978)). Applying these criteria, the Supreme Court in a recent case found that a state program that required state agency approval of the location of new automobile dealerships was immune under the state action exemption. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). The fact that agency hearings were initiated by an existing dealer was deemed immaterial in light of the state's active role and the "clearly articulated and affirmatively expressed" goal of the state policy to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.* at 109, 99 S.Ct. at 411-412. Likewise, the Arizona prohibition against lawyer advertising was immune from federal antitrust regulation because of the "clear articulation of the State's policy with regard to professional behavior" and because such behavior was "subject to pointed reexamination by the policy maker—the Arizona Supreme Court—in enforcement proceedings." *Bates v. State Bar of Arizona*, 433 U.S. 350, 362, 97 S.Ct. 2691, 2698, 53 L.Ed.2d 810 (1977).

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[7] The *Parker v. Brown* state action doctrine should be distinguished from the related but different doctrine of implied immunity flowing from the passage or existence of other federal statutes. *See, e.g., National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, — U.S. —, 101 S.Ct. 2415, 69 L.Ed.2d 89 (1981).

In contrast, the Supreme Court has rejected blanket state action immunity merely because some state regulation of the relevant business exists. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). The purposes of the regulation must be to avoid the consequences of unrestrained competition in the market for which immunity is sought. *Id.* at 595, 96 S.Ct. at 3119. In *Cantor*, where the only articulated state policy dealt with the regulation of the distribution and sale of electric power, there was no immunity in the retail market for light bulbs merely because a state agency had approved, as part of a public utility tariff, the free distribution of light bulbs by the utility to its customers. The distribution of light bulbs was part of an unregulated market in the state. *Id.* at 584, 96 S.Ct. at 3114. The free distribution of light bulbs was initiated by the utility and the agency's role was that of mere passive acceptance. *Id.* at 583, 96 S.Ct. at 3114. Thus, the utility was responsible for its anticompetitive conduct. *Id.* at 593, 96 S.Ct. at 3119. Similarly, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), mandatory fee schedules enforced by a state bar association were not immune from the Sherman Act because they were neither mandated by the state articulated policy that lawyers conduct themselves in an ethical man-

ner, nor enforced by a state agency. *Id.* at 788-92, 95 S.Ct. at 2013-2015.[8]

In addition, to invoke the immunity the second requirement, *viz*, "active supervision," must exist. Thus, in *California Liquor Dealers* the Supreme Court found that a state liquor retail price maintenance system was not immune from the Sherman Act because, although it satisfied

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[8] Turf argues that *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975), requires that the conduct be "compelled" by the state acting as sovereign rather than merely "prompted." It appears that the statement in *Goldfarb* regarding compulsion refers to a combination of the criteria that there be both a clear articulation of state policy and active supervision by the state itself. 421 U.S. at 788-91, 95 S.Ct. at 2013-2015. In *Goldfarb* neither was present, and the opinion did not specifically separate the criteria. Thus, *Goldfarb* does not preclude a finding of state action immunity merely because of the presence of some private decision making pursuant to a clearly articulated state policy that is actively supervised by a state entity even though the supervision does not rise to the level of compulsion.

We recognize that other courts have found a "compulsion" requirement when reviewing conduct of "private" parties. *See, e.g., Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 497 F.Supp. 230, 237-38 & n.9 (D.Conn.1980). We find further support for our view that compulsion is not required in *Cantor*. Justice Stevens, when speaking for the Court in Section III of the opinion, *see* note 12, *infra*, noted that typically, regulated industries "involve a blend of public and private decisionmaking." 428 U.S. at 592, 96 S.Ct. at 3118 (footnote omitted). He noted that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Id.* at 592-93, 96 S.Ct. at 3118-3119 (footnotes omitted). He went on to note the parallel problem of determining when state action for due process and equal protection purposes exists in the regulatory context. *Id.* at 594 n.31, 96 S.Ct. at 3119 n.31. He cited *Jackson V. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), which noted the importance of whether the private party initiated the challenged practice, and the degree to which the state agency puts "its own weight on the side of the proposed practice." *Id.* at 357, 95 S.Ct. at 456-457. Such an inquiry would be useless if state compulsion were the litmus test for antitrust immunity. Here, it was clearly the state legislature that initiated the practice, and thus the question must turn on the degree to which the state or its agency has put "its own weight on the side of [that] practice."

the first requirement that it be adopted pursuant to a clearly articulated and affirmatively expressed policy to displace competition, it was not actively supervised by the state. 445 U.S. at 105-06, 100 S.Ct. at 943-944. The state neither set the prices, reviewed them for reasonableness, nor regulated the contract terms. *Id.*

[17] Application of these principles to the facts of this case is not without difficulty. Turf admits that the Arizona Legislature has clearly evidenced a policy to limit the number of days allowed for horse racing and that those days be allocated to the most qualified. Turf, however, argues that the articulated policy does not support "collusion between two private parties to eliminate competition between them in making application for available racing days." Turf claims that the Commission may allocate racing days only to those who apply for specific days, and that here there is no supervision of the allocation—rather it is decided solely by the provisions of the private lease agreement. Turf contends that the restraint fails to satisfy both of the conditions set forth by *California Liquor Dealers.* The first is not satisfied because the underlying public policy evidenced by the state's regulation is that racing dates be allocated to the most qualified applicants, not that they be allocated by private agreement. The second also is not sat-

isfied. Turf claims the private date allocation is not actively supervised by the state.[9]

We cannot accept Turf's arguments. The state statute enacted in 1956 provided that private agreements between parties seeking conflicting dates in the same county would be recognized by the Commission. This statute was enacted prior to the time Turf and Downs entered into the challenged agreement. Thus, it was the stated policy of the Arizona Legislature that conflicts in dates be settled by the private parties and not by the Commission. Ariz.Rev.Stat. §

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[9] Turf also argues in its brief that even if *Parker v. Brown* immunity were to apply in this case, that the "*Parker* defense can be raised only by a governmental entity that is a party to the lawsuit." Turf relies primarily on *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), for this proposition. *Id.* Turf misreads *Cantor*, and its position is unsupportable.

Justice Stevens authored the opinion in *Cantor*. In Part II he found that since the actions complained of were actions of private parties, albeit arguably under state compulsion, that *Parker* was inapplicable because it had involved actions of the state. 428 U.S. at 585-92, 96 S.Ct. at 3115-3118. Part II was accepted only by Justices Brennan, White, and Marshall, *id.* at 581, 96 S.Ct. at 3113, and consequently did not command a majority of the court. Part III, which did command a majority, then proceeded to analyze the relationship between the conduct of the private party and the state regulatory agency to determine if immunity was available nonetheless. *Id.* at 592-98, 96 S.Ct. at 3118-3121. It concluded that immunity was not available under the facts of *Cantor*. *Id.*

The view expressed in Part II of *Cantor* that private conduct that is intertwined with state conduct cannot support an immunity defense for the private actor was implicitly rejected in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). There, the Court specifically stated that it was considering "whether the State's involvement in the price setting program is sufficient to establish antitrust immunity under *Parker v. Brown*." Thus, Turf's contention regarding *Cantor* is unsupportable. Moreover, *Cantor* cannot possibly be read to stand for the proposition that Turf asserts. Justice Stevens' opinion itself recognized that immunity might apply to conduct of private parties, albeit not under *Parker*, in Part III. 428 U.S. at 592-98, 96 S.Ct. at 3118-3121. Consequently, regardless whether immunity flows to private conduct under *Parker*, or under some other "regulatory" doctrine, it may still be available to a private party as a defense.

5-108.01 (1956). Moreover, notwithstanding this policy, it was and still is the duty of the Commission to assure that only qualified applicants were granted permits. *See, e.g.*, Ariz.Rev.Stat. § 5-104 (West 1974 & Supp. 1980-81) (issue racing dates, supervise racing meetings, inspect racing sites, promote the public health and safety); Ariz.Rev.Stat. § 5-107.03 (West 1974 & Supp. 1980-81) (review all financial information submitted by a permittee); Ariz.Rev.Stat. § 5-108(A) (West 1974 & Supp. 1980-81) (conduct a "thorough investigation concerning an application for a permit;" refuse issuance under specific grounds, *e. g.*, not in the best interests of safety, welfare, *economy*, health and peace of the people of the state). As noted by the district court, we must recognize that Arizona has a strong interest in the conduct of horse racing activities in the state because they are incident to legalized pari-mutuel wagering.

Taken together, the above statutory scheme articulates a policy "affirmatively and expressly" to replace unfettered competition in the application for racing dates (and consequently the right to run a gambling operation) with regulation. Further evidence of this articulated policy is that in 1967 the statute was amended to grant the current holders of permits a preference in the application process for racing dates. Ariz.Rev.Stat. § 5-110(A) (West 1974 & Supp. 1980-81). Also, all new applications for racing permits issued after February 1, 1971 may only be issued if the Commission, *inter alia*, determines that the issuance of the permit is in the public interest and is *economically feasible*. Ariz.Rev.Stat. § 5-108.01 (West 1974 & Supp. 1980-81). Thus, a free market does not determine who should obtain or continue to hold permits. The State of Arizona has made that determination one provided by statutory law and administrative action.

Turf attempts to separate the various regulatory aspects of the Arizona statutes and the Commission's duties into regulation of gambling, applications for permits, etc. It does this to invoke *Cantor* in support of its position. Arizona,

however, has an integrated regulatory scheme. Unlike the situation in *Cantor*, where the regulation of the distribution of electricity could be easily separated from the regulation of the distribution of light bulbs, regulation of gambling requires regulation of permittees, and the manner in which they were selected. We hold, therefore, that the first condition of *California Liquor Dealers* is met.

Turf's argument that the second condition, *viz.*, "active supervision," is also rejected. The Commission does not merely acquiesce in the agreement regarding the allocation of dates. It remains under a duty to "thoroughly investigate" a permit application. To obtain a permit an applicant must meet *all* the relevant criteria. The Commission, unlike the situation in *California Liquor Dealers*, in effect does review the "reasonableness" of the private date allocation agreement.[10]

Consequently, the *Parker v. Brown* doctrine shields the date allocation agreement from the Sherman Act.

AFFIRMED.

POOLE, Circuit Judge, concurring specially:

I concur in parts I, II, III, and V of the majority opinion, but not in part IV.

Whether the allocation of racing dates under the somewhat unique facts here constitutes a potential *per se* violation of the Sherman Act because it amounts to a horizontal restraint between competitors on the same level—an impermissible division of territories—was not decided by the district court. Such a determination was apparently seen by the district judge as a complex and troublesome antitrust issue, the resolution of which became unnecessary because he found (although he did not articulate) an alternate and sufficient basis for dismissal of the action under

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[10] The portion of section 5-110(A) dealing with the alternating date applications has been construed to be "directory" rather than "mandatory." *Arizona Downs v. Arizona Horsemen's Foundation*, *supra*, at __, __ P.2d at __.

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The majority here also finds that there is the same alternate ground upon which to rest its affirmance and I have concurred in that determination.

I would, however, postpone to another day the responsibility for deciding an issue whose disposition is not nearly as easy or as clear as the majority assumes and which we simply do not need to tackle at this time.

Were the holding on this point really to be taken as a live precedent, I would find it necessary to express dissent. Since, however, that discussion seems mainly to be an interesting analysis rather than overtly decisional, I prefer to limit my concurrence to the majority's opinion (which I find otherwise quite satisfactory) in the manner I have set forth above.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TURF PARADISE, INC., an Arizona corporation, Plaintiff-Appellant, vs. ARIZONA DOWNS, an Arizona corporation, Defendant-Appellee.	No. 80-5185 ORDER

Before: WRIGHT, SNEED, and POOLE, Circuit Judges

Footnote 1 of the panel's opinion of December 8, 1981 is amended to read as follows:

1. The Arizona Supreme Court's decision in the state case was filed after oral argument. That court held the lease agreement did not run afoul of the state antitrust law because it had been authorized in another, more specific, Arizona statute and the authorization was not unconstitutional. *Arizona Downs v. Arizona Horsemen's Foundation*, No. C-371759, 130 Ariz. __, __ P.2d __ (Ariz. Dec. 8, 1981). In arriving at its conclusion, the Arizona Supreme Court noted that its analysis of the state antitrust claim is inapplicable to federal antitrust claims. *See id.* at 17-18 & n.3.

Agreeing with the latter conclusion, we conclude that the principle of res judicata is not a bar to our proceeding. Unlike the situation in *Nash City Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981) (which held that a state antitrust judgment may bar a federal antitrust action), we are not confronted with a configuration of "like statutes of two separate jurisdictions," which condemn "the same wrong." *Id.* at 490. Indeed, the Arizona Supreme Court's decision conclu-

sively established that the lease agreement was outside the ambit of the state antitrust law. It, therefore, is unnecessary for us to decide at this time whether this circuit should adopt the holding in *Nash*.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TURF PARADISE INC., an Arizona corporation, Plaintiff, vs. ARIZONA DOWNS, an Arizona corporation, Defendant.	NO. CIV 78-978 PHX CAM ORDER

The Court, having received and considered Defendant's Motion for Summary Judgment, filed May 23, 1979, pursuant to Rule 56(b) and (c), Fed. R. Civ. P., and the attached Local Rule 11(h), Statement of Facts and the exhibits appended thereto, Plaintiff's Motion for Partial Summary Judgment, filed July 18, 1979, all related responses and replies to both motions, and having heard oral argument on these matters on October 1, 1979, finds and concludes as follows:

That the statement of facts and exhibits offered by Defendant are not directly contradicted by Plaintiff and that the alleged illegal conspiracy in question could not have been formed but for the participation of the Plaintiff, particularly in view of the fact that there were only two parties to the agreement in question. See *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976); *Dreibus v. Wilson*, 529 F2d 170, 174 (9th Cir. 1975).

That Plaintiff's measure of participation was sufficient to bar its recovery of damages. See *Javelin, supra; Dreibus, supra.*

That Plaintiff's participation would not bar it from acting as a private attorney general in enforcing the public's interest, if any, in this matter. See e.g., *Memorex Corp. v. IBM Corp.*, 555 F.2d 1379, 1382 (9th Cir. 1977).

That *Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730 (9th Cir. 1979), may be dispositive of this action, as mentioned by Defendant at oral argument, but that the pleadings and facts presented are insufficient for the Court to rule on the applicability of *Thornhill* at this time for the reasons that there are insufficient facts before the Court, Plaintiff has not had an opportunity to respond to Defendant's argument on this point and it is matter that should be properly briefed for the Court.

Therefore,

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment is denied; Defendant's Motion for Summary Judgment is granted on the issue of damages and Defendant shall forthwith submit a form of judgment to the Court for its consideration; and Defendant shall submit such motions as appear warranted based on the *Thornhill, supra*, decision.

DATED AT PHOENIX this 2nd day of October 1979.

C. A. MUECKE, Chief Judge

Elias M. Romley
Roger T. Hargrove
ROMLEY & SHERK
718 Arizona Title Building
Phoenix, Arizona 85003
(602) 266-4900
Attorneys for Defendant

THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

TURF PARADISE, INC., an Arizona corporation, Plaintiff, vs. ARIZONA DOWNS, an Arizona corporation, Defendant.	No. CIV 78-978 PHX CAM PARTIAL SUMMARY JUDGMENT (On Issue of Damages)

The Court on October 2, 1979, following oral argument on October 1, 1979 on Defendant's Motion for Summary Judgment and on Plaintiff's Motion for Partial Summary Judgment, entered herein an Order wherein the Court: (i) found and concluded that the statement of facts and exhibits offered by Defendant are not directly contradicted by Plaintiff, that the alleged illegal conspiracy alleged by Plaintiff could not have been formed but for the participation of the Plaintiff, particularly in view of the fact that there were only two parties to the agreement in question and that Plaintiff's measure of participation was sufficient to bar its recovery of damages but would not bar it from acting as a private attorney general in enforcing the public's

interest, if any; (ii) denied Plaintiff's Motion and granted Defendant's Motion on the issue of damages; and (iii) directed Defendant to submit to the Court a form of judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Partial Summary Judgment be and it hereby is denied and that Defendant's Motion for Summary Judgment be and it hereby is granted on the issue of damages.

DATED at Phoenix, Arizona, this 16th day of November, 1979.

C.A. MUECKE, Chief Judge

LODGED with the Court and copy
delivered to Plaintiff's attorneys
this 13th day of November, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TURF PARADISE, INC., an Arizona corporation, Plaintiff, vs. ARIZONA DOWNS, an Arizona corporation, Defendant.	No. CIV 78-978 PHX CAM ORDER

The Court, having received and considered Plaintiff's Motion for Partial Summary Judgment filed December 13, 1979, pursuant to Rule 56, Federal Rules of Civil Procedure, the related pleadings filed in response and with respect to said motion, the oral arguments of the parties, and having reviewed the record in this matter, finds and concludes as follows:

(1) That inextricably intertwined in the subject matter of this litigation is legalized gambling within the borders of the State of Arizona;

(2) That said activities, and horse-racing in particular, are the subject of extensive regulation by the State of Arizona (A.R.S.Ann.§5-101, et seq.);

(3) That the parties have cited the Court to no case in which such strong state policy issues were treated as proper subject matter for disposition under the Sherman or Clayton Acts or under the commerce clause of the Constitution;

(4) That the interest of the State of Arizona in the resolution of this matter greatly exceeds that of the federal government;

(5) That both parties are Arizona residents and jurisdiction in the above entitled and numbered case in founded on the alleged existence of a federal question (28 U.S.C.§1331 & 1337);

(6) That the resolution of the pending lawsuit in the Superior Court, Maricopa County, Arizona (*Arizona Horsemen's Found., Inc. v. Arizona Downs, et al.*, No. C 371759) may well be dispositive of the instant case; and that, therefore,

(7) The proper course for the Court to take in this action is to abstain from further consideration of the matter. *See County of of Allegheny v. Frank Mushuda Co.*, 360 U.S. 185, 79 S.Ct. 1060 (1959).

Therefore,

IT IS ORDERED that the Complaint is dismissed for the reasons above stated; that Plaintiff shall take nothing by his Complaint; and that each party shall bear its own costs.

DATED this 29th day of January, 1980, at Phoenix, Arizona.

C. A. MUECKE, Chief Judge

AGREEMENT

THIS AGREEMENT made this 9th day of October, 1956, by and between TURF PARADISE, INC., an Arizona corporation, hereinafter called "First Party", and INGLESIDE TURF CLUB, INC., an Arizona corporation, hereinafter called "Second Party",

WITNESSETH:

THAT, WHEREAS, First Party is the owner and operator of that certain horse racing plant, hereinafter referred to as "racing plant", located at the southeast corner of the intersection of Nineteenth Avenue and Bell Road near Phoenix, Maricopa County, Arizona, the land on which said racing plant is located being

> Northwest Quarter (NWQ); West Half of the Northeast Quarter (W½NEQ); and the North Half of the Southwest Quarter (N½SWQ), of Section Six (6), Township Three (3) North, Range Three (3) East, G. & S. R. B. & M.

and commonly known as "Turf Paradise"; and

WHEREAS, First Party and Second Party, and each of them, are authorized under the laws of the State of Arizona to conduct horse racing meets within the County of Maricopa, State of Arizona.

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements by them to be kept and performed, the parties hereto agree as follows:

1. That for the term beginning October 1, 1956, and ending September 30, 1976, Second Party shall have the right to the use and occupancy of the racing plant of First Party, hereinbefore described, for the purpose of preparing for, and operating and conducting, horse racing meets authorized by the Arizona Racing Commission or any other governmental agency exercising legal jurisdiction. The right herein granted is, except as otherwise hereinafter expressly provided, for the use and occupancy of the complete racing plant of First Party, including without limiting the forego-

ing, the track, grandstand, stables and parking. The term of such use and occupancy in and during each year of the term of this agreement shall be for such period of time as shall be allocated to Second Party by authority of law for the purpose of conducting such racing meets.

The parties hereto recognize that heretofore the total racing dates legally available to the parties hereto have been applied for and allocated substantially equally between First Party and Second Party, or the predecessors. The parties hereto agree that during the term of this agreement the total number of racing dates legally available to the parties hereto in a racing season shall be divided equally, one-half (½) thereof to First Party and one-half (½) thereof to Second Party. The term "racing season" as used herein means that period of time beginning with the first day allocated by the Arizona Racing Commission at its meeting each year for horse racing at First Party's racing plant and ending with the last day so allocated.

The parties hereto agree that unless they otherwise mutually agree, they will alternate each year in applying for the racing days in the first half and in the last half of each racing season, with the First Party to apply only for the racing days in the first half of the next racing season beginning after July 1, 1957, and Second Party to apply only for the racing days in the last half of said racing season. In addition to the period of time allocated to Second Party by legal authority for conducting any horse racing meet, Second Party shall have the use and occupancy of so much of the racing plant as reasonably necessary to the opening and closing of its racing meet for a reasonable time preceding and following its horse racing meet; provided, however, such use and occupancy shall not be of such a nature as to interfere in any manner with the conduct by First Party at its said racing plant of any horse racing meet authorized by legal authority. In this connection, the parties hereto agree that it is the intent of this agreement that the use and occupancy of the racing plant of First Party by both First

Party and Second Party shall be such as to cause as little interference as possible with any racing meet contucted by either of the parties.

Anything to the contrary herein notwithstanding, adequate office space shall be agreed upon and provided within the racing plant of First Party to each of the parties hereto, so that each of the parties may at all times during a calendar year carry on and conduct its business.

Second Party shall have the right to use all personal property owned and used by First Party in the conduct of horse racing meets other than the starting gate.

2. (a) Second Party shall pay to First Party in consideration of the execution of this agreement and as rental for said racing plant and equipment the following amounts, to wit:

An amount equal to one per centum (1%) of the average daily mutuel handle up to and including $170,000.00;

An amount equal to one and one-quarter per centum (1¼%) of the average daily mutuel handle in excess of $170,000.00 up to and including $200,000.00;

An amount equal to one and one-half per centum (1½%) of the average daily mutuel handle in excess of $200,000.00 up to and including $400,000.00;

An amount equal to one and one-quarter per centum (1¼%) of the average daily mutuel handle in excess of $400,000.00.

(b) The preceding amounts under subparagraph (a) apply only to the mutuel handle on Wednesdays, Saturdays, Sundays and holidays, the days on which horse racing has been usually conducted in this area. In the event Second Party, during the term hereof, shall conduct horse racing meets on an additional day or days other than Wednesdays, Saturdays, Sundays and holidays, Second Party shall pay to First Party, in addition to the amounts required to be paid under subparagraph (a), an amount equal to the same percentage of the mu-

tuel handle on such day computed as provided in subparagraph (a), except that should the mutuel handle on said additional day or days be less than $160,000.00 then the first $100,000.00 of such mutuel handle shall be exempted in applying such percentage.

The foregoing exemption shall not apply to more than one (1) additional day per week unless First Party consents thereto, or is itself conducting or planning to conduct horse racing on any additional day Second Party proposes to conduct horse racing. Whenever the mutuel handle on an additional day amounts to $160,000.00 or more, the mutuel handle for such additional day shall be included in determining the average daily mutuel handle under subparagraph (a) of this paragraph 2, otherwise it shall not be included.

(c) The rent to be paid by Second Party to First Party with relation to each horse racing meet conducted by Second Party prior to September 30, 1966, under this agreement shall be decreased by any amount that the net income or revenue resulting to Second Party from conducting such horse racing meet is less than $86,000.00.

The rent payable by Second Party to First Party hereunder with respect to horse races conducted by Second Party at the racing plant of First Party, shall be paid as follows:

In the event the average daily handle on Wednesday, Saturday, Sunday and any holiday in any calendar week of such horse racing meet amounts to $170,000.00 or more, Second Party shall pay to First Party, to apply on the rent due under this agreement, on the Tuesday following such calendar week, one per centum (1%) of the total handle for such days. The amount, if any, payable to First Party under this agreement which remains unpaid at the termination of any horse racing meet conducted by Second Party at the racing plant of First Party shall be paid within thirty (30) days after the final racing day of such meet, except that with respect to any horse racing meet held prior to

August 1, 1959, such payment shall be made on or before the 1st day of August following the last racing day of any such horse racing meet. Should the payments made by Second Party to First Party during the horse racing meet be found, at the close of said meet, to exceed the amount of rental payable to First Party hereunder, First Party shall pay to Second Party such excess within thirty (30) days after written notice thereof.

3. Anything to the contrary herein notwithstanding, Second Party takes and accepts this agreement subject to the concession agreement heretofore entered into by First Party with R. S. Hooper, a copy of which is attached hereto marked "Exhibit A". All income or payments payable to First Party under said concession agreement during the period Second Party is conducting a horse racing meet shall be paid by R. S. Hooper to Second Party.

4. Second Party shall pay before delinquent all charges for electrical energy, gas and water, including irrigation water, delivered to and used at said racing plant for the period that Second Party is in and has the use and occupancy of said racing plant, and except as otherwise herein provided during said time, said Second Party shall at its own cost and expense keep and maintain said racing plant, and the whole thereof, except such part thereof as shall be occupied by First Party, in as good condition and repair as the same shall be at the time Second Party is put into possession and occupancy of said plant and facilities, reasonable wear and tear, damage by fire, the elements or acts of God alone excepted, and during said period shall keep and maintain all and singular the premises at and about said racing plant, including all lawns, parking areas, sidewalks, ramps and the like in as good condition and repair as the same shall be when delivered over to Second Party, reasonable wear and tear, damage by fire, the elements and acts of God alone excepted.

Second Party recognizes that First Party has presently under contract a qualified maintenance superintendent, track superintendent and employs a qualified night watchman. Second Party agrees that such maintenance superintendent and said track superintendent shall, during the use and occupancy of said racing plant by Second Party, continue to be in charge of and supervise the maintenance of said racing plant and track, and that said night watchman shall continue to protect said racing plant and the equipment therein. Second Party shall reimburse First Party with respect to said maintenance superintendent, track superintendent and night watchman as follows:

(a) For the amount paid by First Party to the track superintendent for the period beginning two (2) weeks prior to the Monday preceding the commencement of a horse racing meet conducted by Second Party at First Party's racing plant, and ending with the final day of such meet, except that in the years when Second Party conducts the second meet, the payment shall be for the period beginning on the Monday preceding the commencement of its meet.

(b) For the amount paid by First Party to said maintenence superintendent and said night watchman during the period commencing on the Monday preceding the first day and ending with the last day of any horse racing meet conducted by Second Party at First Party's racing plant.

5. Second Party agrees to conduct all racing meets by it conducted and from said plant and equipment of First Party in a lawful, businesslike and high class manner and agrees that all personnel employed by Second Party shall be required at all times to dress neatly and to conduct themselves in a proper and respectful manner. The parties recognize that First Party has established in said racing plant what is designated by them as a "Turf Club" to which the public is and has been admitted on a limited basis. Second Party agrees to continue and preserve the identity of

said Turf Club as a club limited to members thereof and guests and agrees to employ competent and adequate personnel to supervise the management thereof to the end that said Turf Club shall at all times be continued in a lawful manner and so as not to bring discredit thereto, reserving however, to itself the privilege and right of determining who shall be admitted to said Turf Club and the terms and conditions of such admission. First Party and Second Party agree that prior to the commencement of each racing season, First Party and Second Party shall meet and determine upon the policy to be adhered to by each of said parties with respect to the conduct of said Turf Club, particularly as to the charge to be made for admission thereto during the ensuing racing season, to the end that the same price policy will prevail in the conduct of said Turf Club.

6. Second Party agrees to continue the practice of First Party in admitting customers to enter the "general admission" area through numbering turnstyles and charge a general admission price of One Dollar ($1.00) per person until otherwise mutually agreed, and agrees that it will not indiscriminately issue general admission passes. Second Party reserves to itself the right, unless contrary to law or regulation, to issue and distribute a limited number of general admission passes as Second Party in its discretion deems appropriate and advisable. The parties hereto agree that it is in their mutual interest and to their mutual advantage that all racing meets conducted by either First or Second Party be continued in such fashion as to reflect credit to horse racing and to inspire the confidence of the public in the integrity of the races conducted and also to make said premises as comfortable, convenient and attractive to the public as is economically feasible. Accordingly, it is agreed that in all racing meets conducted, all personnel employed, other than those whose occupations and duties do not permit or make feasible the wearing of uniforms, shall wear appropriate, neat, sighlty and distinctive uniforms and that all such persons shall at all times be required to present a neat and orderly appearance and to

be at all times respectful and courteous to the public. Second Party reserves to itself the right and privilege to maintain its identity in the conduct of its horse racing meet as being the racing meet conducted by the management of Ingleside Turf Club, and it is therefore agreed that all programs and other supplies used by Second Party in the conduct of a racing meet shall indicate that the meet is one conducted under the management of Ingleside Turf Club and Second Party may, before the commencement of any racing meet at said racing plant and thereafter during the term herein specified, maintain at its expense, a sign at said racing plant to be approved by First Party giving notice that a horse racing meet will be held by Second Party between dates stated thereon.

First Party and Second Party, and each of them, agree to run not less than nine (9) races on each racing day races are run during a racing meet, and, unless otherwise mutually agreed, to pay a minimum purse of One Thousand Dollars ($1,000.00) for each thoroughbred race, and a minimum purse of Five Hundred Dollars ($500.00) for each quarter horse race.

7. Second Party agrees to keep and maintain all equipment and furniture used by it in as good condition and repair as when received by it, reasonable use and wear and tear, damage by fire, the elements or acts of God alone excepted, and said Second Party shall repair or replace any damaged or broken furniture or equipment.

8. All costs and expenses incurred by Second Party in the conduct of racing meets at and from said racing plant of First Party shall be borne and paid by Second Party.

9. It is understood and agreed that this agreement is upon the condition that the Arizona Racing Commission shall approve the transfer of the racing location of Second Party from its present location at what is commonly known as "Arizona Downs" to the premises the subject of this agreement. In the event the Commission shall refuse to approve such transfer, then this agreement shall thereupon

terminate. Should horse racing or pari-mutuel betting, at any time during the term of this agreement, become and be illegal at the racing plant of First Party under the laws of the State of Arizona or under the regulations, laws or ordinances of any governmental body having jurisdiction, then this agreement shall terminate and become void and of no force and effect; provided, however, that in the event horse racing shall thereafter become and be legal again, and shall be resumed at First Party's racing plant, then Second Party shall have the right and option to revive and renew this agreement. The foregoing right shall be exercised by Second Party within one (1) year from the date that racing again becomes legal or is again resumed at First Party's racing plant, whichever is the later.

10. It is understood and agreed that First Party during all periods of time that it shall be in possession of the racing plant and equipment shall keep and maintain the same in good order and repair, and at the time of the surrender of possession thereof to Second Party, said plant and all equipment, shrubs, plantings, ornaments and all personal property the subject of this lease shall be found in good order and repair.

11. In the event Second Party shall default in the performance of any of the terms and provisions hereof, other than that of paying the rentals required hereunder when due, First Party shall promptly notify Second Party in writing of such claimed default specifying the nature and particulars thereof and Second Party shall have thirty (30) days within which to remedy such default, other than as to the payment of rent and as to which default Second Party shall only be entitled to five (5) days' notice in writing. In the event Second Party shall fail to remedy and correct such default within the time specified, First Party may terminate this lease agreement.

12. Second Party agrees to save First Party harmless from any loss, expense or damage resulting from the acts or omissions of Second Party or its agents, and First Party agrees to save Second Party harmless from any damage, loss or expense occasioned by any act or omission of First Party or its agents.

13. The parties hereto agree that a policy of public liability insurance shall be procured with a recognized public liability insurance carrier with limits of $100,000/$500,000 as to personal injury and $50,000 as to property damage. The cost of such insurance shall be divided equally between First Party and Second Party.

14. First Party agrees that so long as this agreement is in full force and effect it will not, without the consent of Second Party, permit any horse racing at its racing plant except horse racing meets conducted by First Party and/or Second Party.

Second Party agrees that so long as this agreement is in full force and effect, it will not, directly or indirectly, conduct a horse racing meet in Maricopa County, Arizona, except at the racing plant of First Party.

15. The Second Party, provided it is not in default in the performance of the terms and conditions of this agreement, or of any of them, shall have the option to renew this agreement for a further and additional period or term of twenty (20) years. If Second Party exercises the foregoing option and is not in default in the performance of the terms and conditions of this agreement, or any of them, then Second Party shall have the option to renew this agreement for a further and second additional period of twenty (20) years. The first of the above options shall be deemed to have been exercised by Second Party, unless, not less than six (6) months nor more than twelve (12) months prior to the expiration of the original term of this agreement, Second Party gives notice in writing to First Party of Second Party's intention not to exercise said option. The second of the above options shall be deemed to have been exercised by Second

Party, unless, not less than six (6) months nor more than twelve (12) months prior to the expiration of the first additional twenty (20) year term of this agreement, Second Party gives notice in writing to First Party of Second Party's intention not to exercise said option.

16. Second Party reserves the right to terminate this agreement on the 30th day of September, 1957, by giving to First Party on or before April 25, 1957, notice of Second Party's intention to so terminate the agreement.

17. It is understood and agreed that this agreement shall extend to and for the benefit of and be binding upon the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed on the day and year first hereinbefore written.

TURF PARADISE, INC., an Arizona corporation

By _____
President

ATTEST:

_____
Secretary

FIRST PARTY

INGLESIDE TURF CLUB, INC., an Arizona corporation

By _____
President

ATTEST:

_____
Secretary

STATE OF ARIZONA
County of Maricopa } ss.

On this, the 9th day of October, 1956, before me, the undersigned Notary Public, personally appeared W.R. CLUER and CHARLES L. STROUSS, who acknowledged themselves to be the President and Secretary, respectively, of TURF PARADISE, INC., an Arizona corporation, and that they as such officers, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by themselves as such officers.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Marilyn R. Lindlan
Notary Public

My Commission expires:
My Commission Expires July 8, 1959

STATE OF ARIZONA
County of Maricopa } ss.

On this, the 9th day of October, 1956, before me, the undersigned Notary Public, personally appeared JAMES H. HERBUVEAUX and H. J. HUGHES, who acknowledged themselves to be the President and Secretary, respectively, of INGLESIDE TURF CLUB, INC., an Arizona corporation, and that they as such officers, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by themselves as such officers.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Marilyn R. Lindlan
Notary Public

My Commission expires:
My Commission Expires July 8, 1959

15 U.S.C.§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawfulful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15U.S.C.§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

28 U.S.C. § 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11,

any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

A.R.S. § 5-108.01 (1956). Settlement of conflicts in applications

A. When two or more applications by qualified applicants are filed with the commission seeking racing permits and to conduct racing on the same day or dates in the same county for dog racing or when two or more such applications are filed seeking racing permits and to conduct racing on the same day or dates within the same county for harness or horse racing, a conflict shall be deemed to exist, except that (1) applications for a state or county fair meet and (2) applications for permits to conduct horse or harness racing on any same day that may be included in an application for a permit to conduct dog racing shall not be construed to create a conflict.

B. In the event of a conflict the qualified applicants shall attempt to resolve each conflict by an agreement in writing in which agreement each such applicant shall receive and be allocated dates in such manner as will eliminate such conflict, to be filed with the commission on or before the thirtieth day of June following the filing of such applications.

C. In the event no agreement is reached the commission, after ten days written notice to such qualified applicants, shall conduct a hearing. The commission shall make a finding as to the relative value for racing meet purposes of the

days available for racing meets of the kind applied for and the commission shall, in racing permits issued to each such applicant, allocate said days consecutively and in a fair and impartial manner.

A.R.S. § 5-110. Racing days and times; emergency transfer; county fairs; charity days

A. In counties having a population of one hundred eighty thousand, or more, as shown by the last United States census, permits issued under the provisions of this article shall be limited in any one calendar or fiscal year to one hundred twenty days of horse racing, forty-five days of harness racing and one hundred twenty days of dog racing, except that in counties having a population of four hundred thousand, or more, as shown by the last United States census, are authorized to have an additional thirty days of horse racing and an additional thirty days of dog racing. In such counties, harness racing shall be conducted between the hours of five o'clock p.m. and one o'clock a.m. between November 1 and the following April 15. In all other counties permits issued under the provisions of this article shall be limited in any one calendar or fiscal year to forty-five days of horse racing or harness racing and ninety days of dog racing. Permits shall be issued for substantially the same dates allotted to permittees during the preceding year or for such other dates as such permittees shall request, provided that, in the event there is a conflict in dates requested between two or more permittees in the same county for the same kind of racing, then and in such event, the permittee whose application is for substantially the same dates as were allotted to him in the preceding year shall be entitled thereto in preference to any other permittee. In the event two or more permittees shall have agreed that the dates to be allotted to each of them each year shall be alternated from one year to the next, then and in such event, such agreement shall be recognized by the commission and such permittees shall be accorded preference over any other permittee as to those dates to be allotted to such permittees on an alternating

basis. Except as otherwise provided, the commission shall allot dates to the respective permittees after giving due consideration to all of the factors involved and the interests of such permittees and the public and state of Arizona generally.

Opposition

No. 81-1872

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States

October Term, 1981

TURF PARADISE, INC.
AN ARIZONA CORPORATION,
Petitioner

vs.

ARIZONA DOWNS, AN
ARIZONA CORPORATION,
Repondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ELIAS M. ROMLEY
ROGER T. HARGROVE
ROMLEY & SHERK
320 East Virginia Avenue
Phoenix, Arizona 85004
Tel. (602) 266-4900
Attorneys for Respondent

May 4, 1982

QUESTION PRESENTED

Should this Court exercise its discretion to review a decision of the Court of Appeals, holding:

(1) that the Sherman Act does not apply to the provisions of a lease agreement allocating use of a horse racing facility between owner and lessee, where the state statutory scheme articulates an affirmative and express policy to replace unfettered competition with regulation in the business of horse racing and pari-mutuel wagering, and the state actively supervises that express policy; and, alternatively,

(2) that a lease agreement between competitors to share temporally the use of a common facility necessary to the conduct of their separate horse racing businesses does not violate the Sherman Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED	11
II. THE COURT OF APPEALS PROPERLY APPLIED STATE ACTION IMMUNITY TO THE CHALLENGED LEASE PROVISIONS	13
III. THE LEASE AGREEMENT IS NOT A PER SE VIOLATION OF THE SHERMAN ACT	18
CONCLUSION	21
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES: *Page*

Arizona Downs v. Ariz. Horsemen's Foundation, 130 Ariz. 550, 637 P.2d 1053 (1981) 9,12,13,16

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 18

California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980) 16,17

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) 21

Katzinger v. Chicago Metallic Mfg. Co., 329 U.S. 394 (1947) 11,12

MacGregor v. Westinghouse Elec. and Mfg. Co., 329 U.S. 402 (1947) 11,12

McGrath v. Manufacturers Trust Co., 338 U.S. 241 (1949) 6

N.Y. State Elec. & Gas Corp. v. Fed. Energy Reg., 638 F.2d 388 (2nd Cir. 1980) 17

Parker v. Brown, 317 U.S. 341 (1943) 13,16

Sound, Inc. v. American Tel. and Tel. Co., 631 F.2d 1324 (8th Cir. 1980) 17

Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir. 1982) 2

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd as mod., 175 U.S. 211 (1899) 20

United States v. Terminal R. Asso., 224 U.S. 383 (1911) 11

United States v. Topco Associates, 405 U.S. 596 (1972) 5,9,12,21

STATUTES:

Ariz. Rev. Stat. Ann. § 5-108.01 (1974) (as amended) 3,10,15,16

Ariz. Rev. Stat. Ann. § 5-110.A. (1974) (as amended) 3,13,15,17,18

No. 81-1872

In The
Supreme Court of the United States

October Term, 1981

TURF PARADISE, INC.
AN ARIZONA CORPORATION,
Petitioner

vs.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The citation to the Opinion of the United States Court of Appeals for the Ninth Circuit is *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir. 1982).

STATUTES INVOLVED

In addition to the statutory provisions referenced by Petitioner, the following statutory provisions, which are reprinted in their entirely in the Appendix, are pertinent to an understanding of the nature and scope of the statutory regulation of the business of horse racing:

Ariz. Rev. Stat. Ann. § 5-104 (1974) (as amended)
Ariz. Rev. Stat. Ann. § 5-107.01 (1974) (as amended)
Ariz. Rev. Stat. Ann. § 5-107.02 (1974)
Ariz. Rev. Stat. Ann. § 5-108 (1974) (as amended)
Ariz. Rev. Stat. Ann. § 5-108.01 (1974) (as amended)

STATEMENT OF THE CASE

This suit was initiated by Petitioner Turf Paradise, Inc. (hereinafter "Turf") to break a lease entered into in 1956 with Respondent Arizona Downs (hereinafter "Downs"). Turf is the owner and an operator of the only presently existing commercial horse racing facility in metropolitan Phoenix, Arizona. The 1956 lease grants Downs the use of the facility for a portion of each year. Turf's purpose in this action is to terminate its leasehold obligations to Downs, to eliminate Downs as its only viable competitor, and to acquire a monopoly on horse racing in Phoenix, Arizona by virtue of Turf's ownership of the subject racetrack.

Prior to 1956, Downs and Turf conducted horse racing meetings in Phoenix at separate tracks. Turf made plans to build a new and larger racetrack, and Downs made plans to expand and enlarge its separate racing facility. Turf proposed that Turf and Downs both use the new racetrack owned by Turf. A lease agreement was executed on October 9, 1956 providing for Downs' use and occupancy of Turf's track for one-half of each racing season (Petition,

Appendix A-31 through A-43).[1] Downs abandoned its plans to expand its own racetrack and subsequently sold the property.

At the time of the execution of the 1956 lease, Ariz. Rev. Stat. Ann. § 5-108.01 (1956) (repealed 1968) (Petition, Appendix A-46 through A-47) was in effect, providing that qualified applicants "shall attempt to resolve" conflicts in applications by written agreement "in which agreement each such applicant shall receive and be allocated dates in such manner as will eliminate such conflict." The statute remained in effect until 1968 at which time it was repealed and replaced with Ariz. Rev. Stat. Ann. § 5-110.A. (1974) (as amended) (Petition, Appendix A-47 through A-48) which specifically makes reference to private agreements containing alternation provisions with respect to racing dates such as the lease provisions attacked by Turf in this action. The statute provides that the Arizona Racing Commission ("Commission") shall recognize and accord a preference to applications by prior qualified permittees submitted in accordance with such agreements.

For more than twenty years, Downs and Turf honored their lease agreement, with each conducting racing meetings of approximately equal length during the time periods specified by the lease for their respective utilization of the track. In 1977, Turf changed management and became greedy. Turf filed this action seeking to utilize the antitrust laws to have its lease with Downs declared invalid and unenforceable and to enjoin any further acts to enforce or implement the lease. (Complaint, CR 1, p. 5). Downs no longer has a track of its own; the invalidation of the lease

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[1] Racing season is defined in the lease as "that period of time beginning with the first day allocated by the Arizona Racing Commission at its meeting each year for horse racing at First Party's racing plant and ending with the last day so allocated." (Petition, Appendix A-32). The provisions of the lease agreement apply *only* to those racing days allotted for use at Turf's racing plant and *only* to those racing days legally available to Downs and Turf. The lease does not and cannot affect applications from others for racing days at other locations.

would eliminate Downs as a competitor in the business. Turf attempts to utilize the antitrust laws in this action not to promote competition, but to aid in the restriction of competition by the elimination of a competitor. The District Court and the Court of Appeals have refused to assist Turf in that effort.

Rather than reiterate other pertinent facts set forth in the Opinion of the Court of Appeals, Downs will confine its further comments to correcting some of the inaccuracies and omissions contained in Turf's Statement of the Case.

Turf continues to refuse to acknowledge the obvious fact that two entities cannot both conduct racing meetings at the same racetrack on the same day. There must be some agreement in order to delineate how and when each will have the right to the exclusive use and occupancy of the racetrack, so that applications for racing permits may be submitted accordingly. This is accomplished by the challenged portion of Paragraph 1 of the lease agreement, which defines the yearly period of use and occupancy in a flexible and farsighted manner, while at the same time providing for the intended equal usage of the racetrack:

> (1) The "racing season" is defined for purposes of the lease to be the total number of days that are allocated by the Commission for use at the racetrack each year;
>
> (2) The lease provides for application to the Commission for permits in accordance with the equal usage theme, thereby recognizing that horse racing can be conducted only with a permit issued by the Commission and that the parties cannot alone determine the period of use and occupancy. Each party is *limited* to applying to the Commission for a permit to conduct horse racing at the racetrack for up to one-half of each racing season;

(3) The lease provides for alternation of periods of the racing season for which application may be made, in recognition of the fact that there are certain advantages and disadvantages with respect to racing at various periods of the season. This again demonstrates the equal usage intention of the parties.

Turf seeks to label this "application" aspect of the lease as a horizontal agreement between competitors not to compete, somehow controlled by *United States v. Topco Associates*, 405 U.S. 596 (1972). However, regardless of the method used to define the yearly lease term, applications to the Commission for permits must be made for periods when Turf and Downs respectively have the right to use the track. The method employed by the parties is no different in result than would have been the case if the parties had agreed that Downs' yearly lease term would be for specified months each year. The parties would then apply for racing dates during their respective periods of entitlement to use. There is no substantive difference between defining the yearly period of use and occupancy in terms of applications for permits to the Commission or in terms of calendar months during each year. The method of definition chosen by the parties accommodates any changes that may be made in the racing laws or the racing business during the long term of the lease.

Turf now raises, for the first time at any stage of the proceedings, the claim that the alleged antitrust violation must be alternatively analyzed under the rule of reason. (Petition, p. 4). Throughout the proceedings, Turf has relied exclusively upon its contention that the lease agreement constitutes a *per se* violation, apparently in recognition of the fact that Turf could never prevail under a rule of reason analysis. Downs' leasehold rights in the racetrack owned by Turf create the only impediment to Turf acquiring a monoply on horse racing in the Phoenix, Arizona area; the continued validity of the lease is necessary to preserve competition in horse racing. Moreover, the pleadings demonstrate that Turf has not even attempted to

establish or to preserve for appeal a contention that the case should be alternatively decided under a rule of reason analysis.[2] As this Court has held, issues not presented below will not be considered. *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241 (1949).

Attempting to create some favorable atmosphere, Turf characterizes its lease agreement with Downs as one "to exclude others from the facility" (Petition, p. 2), and attempts to bolster its *per se* argument by claiming that "other potential competitors are prevented from using the facility." (Petition, p. 12). The apparent reference is to Paragraph 14 of the lease agreement, which provides:

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[2] *See, e.g.*, CR 30, Defendant's Response to Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross Motion for Summary Judgment, p. 88, and CR 32, Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment and Response to Defendant's Cross Motion for Summary Judgment, p. 00124, making clear that Turf relied solely upon its claim that the wording of the lease agreement discloses a *per se* violation. In that regard, Downs stated in CR 35, Defendant's Reply to Plaintiff's Response to Defendant's Cross Motion for Summary Judgment, at p. 00130:

> "At page 21 of Downs' Cross Motion for Summary Judgment, it was pointed out that Turf relies exclusively upon the wording of a portion of the lease agreement between the parties to establish that an antitrust violation has occurred. Turf acknowledges sole reliance upon the claim that the subject lease provision is a *per se* violation, and fails to offer any further facts to support its claim that the conduct complained of is in violation of the Sherman Act. (Turf's Response, p. 33). Accordingly, Turf's entire case rests upon whether any *per se* rule of illegality applies. If this Court determines that the *per se* rule is not applicable and that antitrust liability cannot be determined solely with reference to the wording of the lease agreement, then Downs is entitled to judgment in its favor due to Turf's failure to produce evidence sufficient to establish a genuine issue of material fact as to any alleged antitrust violation."

> "First Party [Turf] agrees that so long as this agreement is in full force and effect it will not, without the consent of Second Party [Downs], permit any horse racing at its racing plant except horse racing meets conducted by First Party and/or Second Party."
>
> "Second Party agrees that so long as this agreement is in full force and effect, it will not, directly or indirectly, conduct a horse racing meet in Maricopa County, Arizona, except at the racing plant of First Party."

This lease provision is not an issue in this case; Turf confirmed as much in its Opening Brief in the Court of Appeals: "... it [Paragraph 14] is not at issue in this case." (Turf's Opening Brief, p. 3). Moreover, Turf's argument that Paragraph 14 has been utilized to exclude others from the facility is neither supported by the record nor factually accurate. The only apparent purpose for reference to this "non-issue" is to divert attention away from Turf's objec-

tive — to eliminate Downs as a competitor.[3] Turf's argument did not divert the Court of Appeals: "Its [Turf's] purpose in this case is to increase its control over the racing facility, not to increase the extent to which all competitors share in the use of the facility." 670 F.2d at 822.

Turf places undue emphasis upon the reference in the Opinion to a non-severability clause in the lease, contending that the Opinion "incorrectly speculates that antitrust relief might lead Turf to exclude Downs from Turf's track." (Petition, p. 5). *See also,* Petition, pp. 6 and 12. The referenced "non-severability clause" is contained in Paragraph 14, *supra,* p. 7, which provides that the obligations there stated apply only "so long as this agreement is in full force and effect." Regardless of whether the provision is correctly termed a "non-severability clause" the statement in the Opinion that: "Counsel for Turf in the hearings before the district court acknowledged that elimination of the date allocations provisions could lead to invalidation of the en-

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[3] Turf claims that it "stands ready to share its facility with all entities receiving racing dates from the Commission" (Petition, p. 12). The District Court quickly recognized the fallaciousness of Turf's offer:

> "... if the lease agreement does fall then you in turn have the power to say who else is going to race and not anybody else, because you have the threshold decision to make and if you don't make that threshold decision or whoever you hope to choose is going to be the one that obviously is going to race, certainly no one else can race that doesn't have a lease."
>
> * * *
>
> "... A lot of power there. If the only way they can race is to have a lease then they are not going to race or they are going to race on your terms." (RT 1/28/80, pp. 76-78)

Indicative of Turf's terms is the proposed lease (CR 24) between Turf and potential competitor, Arizona Horsemen's Foundation, submitted to the Commission in support of the Foundation's attempt, with Turf's blessing and assistance, to replace Downs as the tenant at the racetrack. The proposed lease is short term (five years only), with no right to renew, provides for 50% of the Foundation's profits as additional rent, provides that the Foundation shall utilize Turf's operating personnel including Turf's General Manager and racing officials, and specifies no yearly period of use and occupancy.

tire lease . . .", 670 F.2d at 821, is fully supported by the record. Indeed, the Complaint prays for a judgment declaring the *entire* lease to be invalid and uneforceable. (CR 5). At the portion of the transcript referenced in the Opinion, counsel for Turf directly declined to agree that the remainder of the lease could remain in full force and effect with the challenged provisions severed. Turf's intention to eliminate Downs as a viable competitor is beyond doubt.

SUMMARY OF ARGUMENT

The District Court and the Court of Appeals recognized this action as an attempt by Turf to eliminate Downs as a competitor and to increase its share of the business of horse racing and pari-mutuel wagering in metropolitan Phoenix, Arizona. In order to accomplish its objective, Turf claims that its 26-year-old lease with Downs constitutes a *per se* violation of the antitrust laws because it clearly defines the yearly period during which each party will have the racetrack available for its use. The challenged provisions of the lease allocate and divide usage of the racetrack as between the owner, Turf, and the lessee, Downs; horse racing operations by other entities at other locations which in the past have been or in the future may be conducted are of course not affected by the lease. In substance, the lease provisions serve to delineate the periods of use as between owner and lessee and prevent encroachment by one onto the other's property rights.

Turf's contention that the challenged lease provisions constitute a *per se* violation of the Sherman Act under the rationale of *United States v. Topco Associates*, 405 U.S. 596 (1972), has not only been rejected by the Ninth Circuit Court of Appeals, but also by the Arizona Supreme Court in *Arizona Downs v. Ariz. Horsemen's Foundation*, 130 Ariz. 550, 637 P.2d 1053 (1981). The decision of the Court of Appeals for the Ninth Circuit is therefore in harmony with the decision of the state court of last resort with respect to the same subject matter, and the decision does not conflict with the decisions of other federal courts of appeal

or the decisions of this Court. To the contrary, the Ninth Circuit properly applied this Court's decisions to the facts of this case. There is, therefore, no reason for this Court to exercise its discretion to grant certiorari.

Turf refuses to acknowledge the actual facts in arguing that the temporal division of use of the racetrack is anti-competitive because both parties cannot conduct races at the same time. At all times during the existence of the lease, statutes have been in effect which prohibit concurrent racing. The statutes provide the specific means of resolving conflicts in applications *in order to* preclude direct competition in this business. The challenged lease provisions are the direct result of a statute providing that applicants "shall" resolve conflicts in requested racing dates by written agreement. Ariz. Rev. Stat. Ann. § 5-108.01 (1956) (repealed 1968). At all times during the existence of the lease, the statutes have clearly articulated and affirmatively expressed a state policy of restricted competition, particularly and specifically with respect to the issuance of permits and allocation of racing dates; that policy is actively supervised by the state itself through specific statutory regulation and statutory guidelines and directives to the Commission. For that reason, the challenged provisions relating to racing dates are immune from the reach of the antitrust laws under the doctrine of state action immunity.

Moreover, and apart from immunity, the lease agreement does not violate the antitrust laws. The primary object of the parties was to agree to a lease of real property. The challenged provisions serve to specify the yearly lease term and to protect the property interests of the parties by limiting applications for permits for use of the racetrack to racing days in designated halves of each racing season. These provisions are merely ancillary to the main purpose of a lawful lease contract and necessary to protect the legitimate property interests of the parties. The lease agreement is not a naked restraint of trade with no purpose except sti-

fling of competition; the lease preserves competition in the business by providing Downs with a place to conduct its racing meetings.

ARGUMENT

I. *The Petition for Writ of Certiorari Should be Denied*

This action involves a unique provision in a lease drafted in an effort to insure equal availability of the same racetrack to owner and lessee during each year. The drafting of such a provision was complicated by the fact that the parties desired to alternate periods of usage of the racetrack from one year to the next, the fact that racing can only be conducted with a permit granted by the Commission, and the fact that it was necessary to accommodate future changes in the business or its regulation such as increases or decreases in the number of allowable available racing days, allowance of night racing, etc.

These considerations led to a lease provision which one would not expect to encounter in any other instance. As a general matter, there is nothing offensive to the anti-trust laws about competitors sharing common facilities. *See, e.g., United States v. Terminal R. Asso.*, 224 U.S. 383, 405 (1911): "It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use." Turf has cited no decision to this Court or any other court condemning shared use of common facilities by competitors. The decision of the Court of Appeals that the lease does not violate the Sherman Act is not in conflict with any decision of this Court or of any Circuit Court of Appeals.

In *Katzinger v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947), and *MacGregor v. Westinghouse Elec. and Mfg. Co.*, 329 U.S. 402 (1947), this Court granted certiorari because of conflicting decisions by the Seventh Circuit Court

of Appeals and the state court of last resort with regard to the same subject matter. Certiorari was granted in both cases; *Katzinger* was affirmed and *MacGregor* was reversed, thereby eliminating the conflicting results.

Here, the opposite situation exists. The decision of the Ninth Circuit Court of Appeals is in harmony with the decision of the state court of last resort with respect to the identical subject matter. On December 8, 1981, the Arizona Supreme Court rendered its decision in *Arizona Downs v. Ariz. Horsemen's Foundation*, 130 Ariz. 550, 637 P.2d 1053 (1981). In that action, Downs appealed from a judgment in favor of Turf on its cross-claim against Downs, declaring the same lease provision here at issue to be a *per se* violation of the antitrust laws of Arizona.[4] The Arizona Supreme Court rejected Turf's contention that the lease provision is a horizontal market allocation and a *per se* violation of state antitrust law under the rationale of *United States v. Topco Associates*, 405 U.S. 596 (1972). The Arizona Supreme Court reversed the trial court's judgment, stating: "We also hold that Paragraph 1 of the lease between Downs and Turf does not violate the antitrust laws of this state." 637 P.2d at 1063.

There are no "special and important reasons" for this Court to exercise its judicial discretion to grant review on certiorari in this case. The decision of the Court of Appeals for the Ninth Circuit does not conflict with the decisions of other courts of appeals on similar subject matter, and the decision is in harmony with the final decision of the Arizona Supreme Court with regard to identical subject matter. Moreover, and as will be explained more fully below, the Court of Appeals correctly decided the issues.

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[4] When Turf's federal antitrust claims were dismissed by the District Court, Turf filed a cross-claim against Downs in a pending state court action alleging the identical claim as a violation of state antitrust law, while at the same time prosecuting its appeal in the Ninth Circuit Court of Appeals.

II. *The Court of Appeals Properly Applied State Action Immunity to the Challenged Lease Provisions*

Both the District Court and the Court of Appeals rejected Turf's sophistry and denied Turf's attempt to eliminate Downs from the business of horse racing. Both courts agreed that the activity complained of by Turf was immune from the reach of the antitrust laws under the doctrine of state action immunity as expressed in *Parker v. Brown*, 317 U.S. 341 (1943).

The applicability of state action immunity has been made even more clear by the decision of the Arizona Supreme Court in *Arizona Downs v. Ariz. Horsemen's Foundation*, 130 Ariz. 550, 637 P.2d 1053 (1981), which discusses the regulation of horse racing by the state. There, the Arizona Supreme Court considered not only the antitrust validity of Paragraph 1 of the lease, *supra*, p. 12, but also the constitutionality of various racing statutes, including § 5-110.A, *supra*, p. 3.

The Court interpreted Arizona law to mean that the business of horse racing and the concomitant pari-mutuel wagering was not intended to be governed by free and open competition, recognizing that the aspects of the business relating to allocation of racing dates are strictly regulated. Concluding that the statutory preference to permittees to have the same dates from year to year is mandatory, the Court stated:

> "Given the state's legitimate economic/revenue interest in racing, *Hubel, supra* at 243; *People ex rel. Scott v. Illinois Racing Board*, 54 Ill.2d 569, 301 N.E.2d 285 (1973), we have no difficulty characterizing the preference statute as being rationally related to this revenue-raising objective. Because of the limited number of horse racing days authorized by the Legislature, every horse racing organization is competing for a finite number of horse racing days. The state expects these same organizations to operate in a manner which will develop the maximum amount of revenue for the state and at the same time provide a regulated form of

> entertainment for the public. The state has a legitimate interest in encouraging reliable, proven operators to continue in the racing business and to make the necessary investment of capital and effort to develop good racing. As an incentive to investment, it is necessary to provide some assurance of continuity and predictability so that prospective operators can plan on having a certain number of annual racing days in which to recoup their investment. In a somewhat different context, the Supreme Court of New Hampshire observed: 'Licenses [for racing meets] issue only after the expenditure of considerable sums of money and a certain degree of permanence is essential . . . .' *Town of Seabrook v. Perkins*, 112 N.H. 37, 40, 288 A.2d 688, 690 (1972). The policy underlying *Perkins* is the same as the potential rational basis for our preference statute: in order to attract entrepreneurs who will invest large sums of money in racing meetings, it is necessary to provide them with some assurance of a way to recover the investment." 637 P.2d at 1059.

The Court further held that the preference for alternate racing dates is directory upon the Commission.

Another racing statute addressed by the Arizona Supreme Court governs the establishment of new horse racing facilities, including Commission consideration of the *economic effect* of a permit for racing at a new racetrack on existing tracks and permittees. Holding the statute constitutional, the Court stated:

> ". . . The racing industry necessarily involves gambling which by its nature is more attractive to fraudulent schemes than most industries. To protect the public we find the comprehensive legislative scheme, although admittedly restrictive of competition, is necessary to control the possibility of serious abuses."
>
> "The legislative determination to regulate competition on the number of race tracks for horse racing bears a legitimate relationship to the desire of the state to maximize the revenue generated for the state treasury. In this regard the legislature has determined

> that unrestricted competition is not the desirable method to be used to gain the state's objective." 637 P.2d at 1061-1062.

Discussing the reasons Paragraph 1 of the lease between Downs and Turf does not violate the Arizona antitrust laws, the Court noted, with reference to § 5-110.A.:

> "After 1968 the legislature provided that the Racing Commission would allocate the racing dates to applicants on a historical basis, that is, an applicant was entitled to be allotted substantially the same dates as were allotted to him the previous year." 637 P.2d at 1063.

It is apparent from reading § 5-110.A. that the preference provisions were inserted for the purpose of preventing concurrent racing in the same county. The preference provisions apply only "in the event there is a conflict in dates requested between two or more permittees in the same county...." In other words, the Arizona legislature has made clear that direct competition in horse racing is prohibited. The predecessor statute in effect from 1956 to 1968, § 5-108.01 (Petition, Appendix A-46 through A-47) was entitled "Settlement of Conflicts in Applications." That statute also prohibited concurrent racing and provided a means of resolving any conflict in applications, preferably by written agreement of the applicants themselves.

In view of the legislative prohibition of direct competition or concurrent racing, Turf's restraint of trade arguments become absolutely absurd. For instance, Turf argues: "when Turf races, Downs does not; when Downs races, Turf does not. The horse racing market in Phoenix is thereby neatly divided ...." (Petition, p. 3); "Downs and Turf cannot compete with each other because they have agreed that only one of them will conduct races at a time." (Petition, p. 6); "Downs' use of the facility is not competitive because Turf has agreed not to conduct races while Downs does." (Petition, p. 6); and "Downs and Turf simply

cannot compete with each other for racing entrants and patrons so long as only one conducts races at a time." (Petition, pp. 10-11). Similar statements appear throughout the Petition and form the basis of Turf's argument. Turf and Downs do not race at the same time because: (i) it is impossible to do so at the same facility, and (ii) the Arizona legislature has never authorized concurrent racing; this was true even when Downs and Turf operated separate tracks. As recognized by the Arizona Supreme Court, the challenged provisions of Paragraph 1 of the lease agreement were in accordance and harmony with the intent of the legislature as expressed in § 5-108.01 in effect at the time the lease was executed. *Arizona Downs, supra*, 637 P.2d at 1063. Paragraph 1 eliminates conflicting applications and provides assurance of continuity and predictability so long as the statutory qualifications for a permit continue to be satisfied.

The free and open competition which the antitrust laws seek to protect and promote is clearly the antithesis of Arizona's regulation of the issuance of horse racing permits and the allocation of racing dates.

The two standards for antitrust immunity under *Parker v. Brown* as stated by this Court in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), are satisfied in this case. Arizona has clearly articulated and affirmatively expressed a state policy substituting regulation for free and open competition with respect to allocation of racing dates. That policy is actively supervised by the state itself through legislation and Commission supervision and regulation. The challenged provision of the 1956 lease was inserted when a statute was in effect stating the qualified applicants "*shall*" resolve conflicts and applications for racing dates by written agreement.[5] Additionally, there could be no clearer expression of the state's active supervision of the allocation

[5] To the extent that "compulsion" could be considered a separate requirement in addition to those set forth by this Court in *Midcal*, that requirement is satisfied by the "shall" language of A.R.S. § 5-108.01.

of racing days than § 5-110.A., which states precisely how those days are to be allocated. They are either to be allocated in accordance with past permits, or, in the event of a conflict, in accordance with the preference provisions.

As stated in the Opinion:

> "Taken together, the above statutory scheme articulates a policy 'affirmatively and expressly' to replace unfettered competition in the application for racing dates (and consequently the right to run a gambling operation) with regulation."
>
> * * *
>
> "... Thus, a free market does not determine who should obtain or continue to hold permits. The State of Arizona has made that determination one provided by statutory law and administrative action." 670 F.2d at 825.

The application of *Midcal* to the unique facts of this case does not conflict with decisions in other circuits properly applying to *Midcal* criteria.[6] The Court of Appeals correctly held that the State's specific affirmative and active regulation of allocation of racing dates, all as a part of a policy to restrict competition, assure continuity of business and prohibit concurrent racing, makes the so-called date allocation provision of the lease immune from the reach of

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[6] In *Sound, Inc. v. American Tel. and Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980), (Petition, p. 16) the Court stated: "We thus are unable to find in the state statutes any clearly articulated or affirmatively expressed policy of replacing competition with regulation ...." 631 F.2d at 1335. In *N.Y. State Elec. & Gas Corp. v. Fed. Energy Reg.*, 638 F.2d 388, 399 (2nd Cir. 1980), (Petition, p. 16), the Court found: "... no articulation whatever of a state policy underlying the challenge provision ... and there is no hint that it resulted from state policy." These decisions present no conflict with the analysis of the Ninth Circuit.

the antitrust laws.[7]

III. *The Lease Agreement is Not a Per Se Violation of the Sherman Act*

Turf's argument with respect to the applicability of a *per se* rule of illegality merely begs the question; Turf refers to the lease agreement as a "plainly anticompetitive horizontal market division." *See, e.g.*, Petition, p. 6. The fact is, as the Court of Appeals recognized, the lease agreement is not anticompetitive.

> "To employ a *per se* rule to foster increased control by Turf of a facility, access to which is necessary, at least in the short run, to conduct racing in the Phoenix metropolitan area, is a somewhat unusual way to promote competition." 670 F.2d at 821-822.

Turf's attempt to label or characterize the lease agreement as a plainly anticompetitive horizontal market division underscores this Court's wisdom in cautioning against the blind application of a *per se* rule of illegality. For example, in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), the defendants were sued for violation of § 1 of the Sherman Act with respect to a system of blanket licenses for the performance of musical compositions for fixed fees. With reference to the Second Circuit Court of Appeals' view that the blanket licenses involved price fixing in the literal sense, this Court stated:

> "But easy labels do not always supply ready answers.
>
> * * *

[7] In holding that the challenged provision of Paragraph 1 of the lease does not violate Arizona antitrust laws, the Arizona Supreme Court employed reasoning similar to the state action doctrine in holding that the lease provision is impliedly immune from the antitrust laws under the principle of statutory construction that a specific statute (§ 5-110.A.) should govern over the general (Arizona antitrust laws).

"The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue.' Literalness is overly simplistic and often overbroad." 441 U.S. at 8-9.

Explaining the limited application of a *per se* rule, the Opinion continues:

"Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label 'per se price fixing.' That will often, but not always, be a simple matter.

"Consequently, as we recognized in United States v. Topco Associates, Inc., 405 US 596, 607-608, 31 L Ed 2d 515, 92 S Ct 1126 (1972), '[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations. . . .' See White Motor Co. v. United States, 372 US 253, 263, 9 L Ed 2d 738, 83 S Ct 696 (1963). We have never examined a practice like this one before; . . . ." 441 U.S. at 10-11.

In contrast to the position taken by Turf, this Court made clear that it is necessary to consider both the effect and purpose of a challenged practice in order to determine whether the *per se* rule applies, stating:

"More generally, in characterizing this conduct under the per se rule, our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice is to threaten the proper operation of our predominantly free market economy — that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more rather than less competitive.' (citations omitted)" 441 U.S. at 19-20.

Holding the *per se* rule inapplicable, the Opinion concludes:

> "The blanket license, as we see it, is not a 'naked restraint[] of trade with no purpose except stifling of competition.' White Motor Co. v. United States, 372 US 253, 263, 9 L Ed 2d 738, 83 S Ct 696 (1963), . . ." 441 U.S. at 20.

Here, the primary object of Turf and Downs was to agree upon a lease of real property. The challenged provision specifies the yearly lease term; the provision is merely ancillary to the main purpose of a lawful lease contract and necessary to protect the legitimate property interests of the parties. *See, e.g., United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as mod.*, 175 U.S. 211 (1899). Under no view of the facts can the lease agreement properly be classified as having a pernicious effect upon competition, as lacking in any redeeming virtue, as manifestly anticompetitive, or as a naked restraint of trade with no purpose except stifling competition. The prerequisites for a *per se* rule of illegality are not present.

Turf's characterization (Petition, p. 5) of the distinction drawn by the Court of Appeals between a "temporal allocation" and a "territorial allocation" is inaccurate. The Court of Appeals stated:

> "The date allocation provisions, however, do not achieve a territorial allocation between competitors, at least some of whom could, but for the agreement, operate simultaneously within that area to which another is given exclusive rights. Rather, the date allocation provisions achieve a temporal allocation to a competitor of the use of a facility owned by another competitor under circumstances in which it is not possible to have simultaneous use by both. To strike down a territorial allocation manifestly promotes competition, at least among the competitors who are parties to the agree-

> ment, while to strike down the temporal allocation *under the circumstances of this case* does not clearly promote competition." (Emphasis added) 670 F.2d at 821.

Significantly, Turf does not attack the accuracy of these statements, preferring instead to argue that the effect on competition is no longer a pertinent inquiry under the antitrust laws. (Petition, p. 11). Such an absurd result is not required by *United States v. Topco Associates*, 405 U.S. 596 (1972), or *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). The Court of Appeals correctly determined that the lease provision is not a *per se* violation of the Sherman Act.

CONCLUSION

Petitioner Turf Paradise, Inc. has failed to establish that there are special and important reasons for granting the Writ. Despite its assertions of conflicting precedent, Turf has not even referenced an analogous case, much less a case which in any significant way conflicts with the decision of the Court of Appeals. The Opinion correctly applies this Court's decisions to the facts; the Opinion is also in harmony with the decision of the Arizona Supreme Court with reference to the identical lease provision.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Elias M. Romley
Roger T. Hargrove

Romley & Sherk
320 East Virginia Avenue
Phoenix, Arizona 85004
Attorneys for Respondent

Appendix

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

§ 5-104. Commission; powers and duties

A. The commission shall issue racing dates, license personnel, regulate and supervise all racing meetings held in the state and cause the various places where racing meetings are held to be visited and inspected not less than once a year.

B. The commission shall prepare and promulgate such complete rules and regulations to govern the racing meetings as may be required to protect and promote the safety and welfare of the animals participating in such racing meetings, to protect and promote public health, safety and the proper conduct of racing and pari-mutuel wagering and any other matter pertaining to the proper conduct of racing within this state. The commission may delegate to stewards such of its powers and duties as are necessary to fully carry out and effectuate the purposes of this article.

C. The commission may visit and investigate the offices, tracks or places of business of any permittee, and place therein expert accountants and such other persons as it deems necessary for the purpose of ascertaining that the rules and regulations are being complied with.

D. The commission shall supervise the pari-mutuel departments of all tracks, and shall collect the fees payable for a permit or license issued by it, as follows:

1. Occupation licenses up to five dollars.

2. Owner, trainer, veterinarian, authorized agent, officials, assistant trainer, stable name renewal, or kennel name renewal up to twelve dollars.

3. Owner-trainer, jockey, jockey agent, or apprentice jockey up to twenty-five dollars.

4. New stable name or new kennel name up to one hundred dollars.

E. Upon application in writing by an objector to any decision of track stewards, made within three days after the official notification to the objector of the decision complained of, the commission shall review the objection. In the case of a suspension of a license by the track stewards, such suspension shall commence at once and run for a period of thirty days. If at the end of this thirty-day period the commission has not held a hearing to review the decision of the stewards, then the suspended license shall be reinstated until such time as the commission holds a hearing to review the objection.

F. The commission may issue subpoenas for the attendance of witnesses and the production of books, records and documents relevant and material to a particular matter before the commission. Such subpoenas shall be served and enforced in accordance with the provisions of title 41, chapter 6, article 1.

G. Any member of the commission may administer oaths and such oaths shall be administered to any person who appears before the commission to give testimony or information pertaining to matters before the commission.

§ 5-107.01. Necessity for permits for racing meetings; licenses for officials and other persons

A. No person, association or corporation shall hold any racing meeting without having first obtained and having in full force and effect a permit issued by the commission.

B. No trainer, driver, jockey, apprentice jockey, horse owner, dog owner, exercise boy, agent, jockey's agent, stable foreman, groom, valet, veterinarian, horseshoer, steward, stable watchman, starter, timer, judge, food and beverage concessionaire, manager or other person acting as a participant or official at any racing meeting including all employees of the pari-mutuel department, and any other person or official the commission deems proper, shall participate in racing meetings without having first obtained and having in full force and effect a license or credentials

issued by the commission, pursuant to such rules and regulations as the commission shall make. Such license shall not be revoked except for cause and after hearing.

C. Each person, association or corporation holding a permit or a license under this chapter shall comply with all rules, regulations and orders of the commission.

D. Any credential or license issued by the commission to a licensee shall be used only as prescribed by commission regulation. Use for purposes other than those prescribed is grounds for suspension or revocation or imposition of a civil penalty as provided in § 5-108.02, subsection E.

§ 5-107.02. Qualification for eligibility of racing meeting operator

No person, association or corporation is eligible to operate a racing meeting with a permit issued under this chapter unless he or it is an owner or the lessee of the track named in the permit. No permit shall be issued to any corporation or association unless the corporation or association in its application for the permit has specifically named the manager who will operate the racing meeting, has supplied the commission with all relevant information concerning this manager including his relationship with the corporation or association, any previous experience in the racing field, and any other relevant and material information the commission may have requested, and has obtained the commission's approval of the manager so named in the application.

§ 5-108. Issuance of permit or license; grounds for refusal to issue; nontransferable; renewal

A. The commission shall conduct a thorough investigation concerning the application for a permit or a license and:

1. May refuse to issue or renew a permit or license to any applicant if there is substantial evidence to find that the applicant:

(a) Has been suspended or ruled off a recognized course in another jurisdiction by the racing board or commission thereof.

(b) Is not of good repute and moral character.

(c) Has, when previously licensed or granted a permit, violated the racing laws of this state or of any other state or the regulations of the commission.

(d) Is a corporation, firm or association not duly qualified and authorized to conduct business within this state.

(e) If an individual has been convicted of a felony or any crime involving moral turpitude, or, if a corporation, firm or association is controlled or operated directly or indirectly by a person or persons who have been convicted of a felony or any crime involving moral turpitude.

(f) If an individual is engaged in or has been convicted of wagering by other than the mutuel method or in pool selling or bookmaking in any state of the United States or foreign country where such other method, pool selling or bookmaking is illegal or, if a corporation, firm or association is controlled or operated directly or indirectly by a person who is engaged in or has been convicted of wagering by other than the mutuel method or in pool selling or bookmaking in any state of the United States or foreign country where such other method, pool selling or bookmaking is illegal.

(g) Has wilfully violated any provision of this chapter or any of the rules and regulations of the commission.

(h) Should not, in the best interest of the safety, welfare, economy, health and peace of the people of the state, be granted a license or permit.

(i) Enters into any contract or contracts which will not further the best interests of racing or be in the public interest or, in the case of permittees or applicants for permits to conduct racing meetings, fails to file with the commission a contract, as an addendum to an application for a permit to conduct a racing meeting, providing for food and beverage concession rights, if any, at such racing meeting. This provision shall not apply to any contract submitted prior to the effective date of this section. A food and beverage concessionaire contract filed with the commission pursuant to this section shall be available to the public upon request.

(j) Fails to inform the commission on or before May 15 of each year in writing of any material change, occurring during the immediately preceding year of the license or permit term, in the information supplied by the applicant in the application, for a license or permit. In the event that a licensee or permittee fails to file such information, the commission shall notify the licensee or permittee of such failure to file and the licensee or permittee shall have an additional fifteen days, after the notice is mailed to the last known address of such licensee or permittee, to file such information.

2. The commission may refuse to issue or renew a permit to conduct a racing meeting or a food and beverage concessionaire license for any ground set forth in paragraph 1 of this subsection or if there is substantial evidence to find:

(a) That the applicant is not possessed of or has not demonstrated financial responsibility sufficient to meet adequately the requirements of the enterprise proposed to be authorized.

(b) That the applicant is not the true owner of the enterprise proposed to be granted a permit, that other persons have ownership in the enterprise which fact has not been disclosed or, if the applicant is a corporation, that ten per cent of the stock of such corporation is subject to a contract or option to purchase at any time during the period for which the permit is issued unless the contract or option was disclosed to the commission and the commission approved the sale or transfer during the period of the permit.

(c) That the granting of a permit or license in the locality set out in the application is not in the public interest or convenience.

(d) That the applicant, if a corporation or any holder of more than ten per cent of the outstanding stock of any class, transferred, pledged or in any other way collateralized any of its stock after an application for a permit or license was filed with the commission, without prior commission approval. The provisions of paragraph (b) and this paragraph shall not apply to day-to-day transfers of stock of a publicly held corporation unless the transfer, or a combination of transfers, involves a controlling interest in or affects the operational control of the corporation, or involves ten per cent or more of any class of stock of the corporation owned by the controlling shareholders or the manager of any racing meeting.

(e) That the applicant has, or if the applicant is a corporation, its officers, managerial employees, directors or substantial stockholders have committed acts of moral turpitude in this state or have willfully violated a material racing statute of this state or a material rule or regulation of the commission; provided, that should the commission make such a finding, with respect to an officer, managerial employee, director or substantial stockholder, the applicant may be denied a permit only upon the failure to remove the officer, managerial employee or director or the failure of the

substantial stockholder to sell its stock interest. For purposes of this provision a substantial stockholder is one who owns ten per cent of the issued and outstanding stock of the applicant.

3. May deny or refuse to renew a permit or license to any person who has made a knowingly false statement of a material fact to the commission.

4. May deny or refuse to renew a license or permit to any applicant if such applicant has failed to meet any monetary obligation in connection with any racing meeting held in this state.

B. This commission in conducting the investigation referred to in this section shall have the full cooperation of all state agencies and departments, including the department of public safety, and such agencies and departments shall make their personnel available to the commission, upon request.

C. If the commission determines that the applicant for a permit, whether such applicant is a lessee or an individual or corporate owner of the tracksite, meets the requirements prescribed by this article and the rules and regulations of the commission, it shall grant the permit. The permit shall be granted for one year except that the commission may at its discretion grant a permit for a period not to exceed five years to an applicant who has not previously been granted a permit pursuant to this section and who purchases an excess holding and interest required to be sold pursuant to § 5-108.03. Any renewal of a permit shall be pursuant to subsection D of this section.

D. Permits shall be renewed for successive periods of one year unless the commission revokes the permit or refuses to renew the permit for any of the grounds enumerated in this section or § 5-108.03. The renewal of a permit shall be denied only after full hearing and a finding of good cause for refusing renewal shall have been made by the commission.

§ 5-108.01. Hearing on application for or renewal of original permit; notice of hearing; decisions of commission; appeal; transfer or permit

A. The commission shall hold a public hearing on an original application for a racing permit or renewal of a current racing permit under this article. At least fifteen days' notice shall be given to all permittees holding a permit, and they may appear and be heard as parties in interest upon the hearing of an application.

B. A decision of the commission shall become final five days after it has been made unless prior to such date a motion for rehearing is filed by a party to the proceeding before the commission. A rehearing, if granted, shall be held within thirty days from the date of the motion for rehearing. The parties to the proceeding before the commission may commence an action in the superior court of Maricopa county to review the commission's decision pursuant to the provisions of title 12, chapter 7, article 6. Pending determination of the appeal, the decision and order of the commission shall remain in full force and effect, and may not be superseded.

C. The commission shall not issue an original permit to conduct a horse racing, harness racing or dog racing meeting at any place, enclosure or track not used for racing purposes pursuant to permits actually issued as authorized by law prior to February 1, 1971, unless before the beginning of construction or preparation of the place, enclosure or track the commission determines that:

1. The conducting of horse, harness or dog racing meetings at such place will serve the public interest, convenience or necessity,

2. The plan of racing is economically feasible,

3. The issuance of a permit is in the best interest of racing and the state of Arizona generally, and

4. Nothing in this subsection shall be construed to permit any place, enclosure or track used for horse, harness or dog racing on or before February 1, 1971, to be used for any other type of animal racing, except that in counties with a population of less than seven hundred thousand as shown by the last United States census, a place, enclosure or track used for one type of animal racing may be used for any other type of animal racing. In considering an application for a permit under this section, the commission shall give consideration to the number and location of existing tracks, the number of permits already granted and the economic effect the granting of a new permit may have on existing tracks and permittees and the revenues of the state of Arizona.

D. If the owner or lessee of any place, enclosure or track used for racing purposes pursuant to permits issued as authorized by law on or before February 1, 1971, is obligated for any reason to abandon the use of the place, enclosure or track, he may transfer the use and rights to use the premises for racing purposes to any other location in the same county.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 20 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1872

In The
Supreme Court of the United States

October Term, 1981

TURF PARADISE, INC.,
AN ARIZONA CORPORATION,
Petitioner

vs.

ARIZONA DOWNS, AN
ARIZONA CORPORATION,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JON L. KYL
JEFFERSON L. LANKFORD
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Tel. (602) 262-5911
Attorneys for Petitioner

May 19, 1982

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. ARIZONA STATUTES DO NOT MEET THE STATE ACTION REQUIREMENT OF "COMPULSION" BECAUSE THEY DO NOT COMPEL PRIVATE PARTIES TO ACT ANTICOMPETITIVELY	3
II. IN THIS PER SE CASE, DOWNS' CHARACTERIZATION OF THE PURPOSE OF THIS ACTION IS IRRELEVANT	5
III. *ARIZONA DOWNS V. ARIZONA HORSEMEN'S* NEITHER PURPORTS TO DECIDE NOR HAS DECISIVE EFFECT ON THE FEDERAL ANTITRUST QUESTIONS IN THIS CASE	8
IV. THE ASSERTED STATE POLICY AGAINST "CONCURRENT RACING" DOES NOT SUPPORT AN ANTICOMPETITIVE PRIVATE AGREEMENT TO ALLOCATE RACING DATES	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	*Page*
Arizona Downs v. Arizona Horsemen's Foundation, 120 Ariz. 550, 637, P.2d 1053 (1981)	6-9
Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979)	7
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	6
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	4,9
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)	4,9
Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980)	5
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	4
Phonotele, Inc. v. American Tel. & Tel. Co., ____ F.2d ____, 1981-2 Trade Cas. (CCH) ¶64,413 (9th Cir. Dec. 3, 1981)	4
Ronwin v. State Bar of Arizona, 663 F.2d 914 (9th Cir. 1981)	4
United States v. Southern Motor Carriers Rate Conference, ____ F.2d ____ (5th Cir. No. 79-3741, April 5, 1982)	4
United States v. Terminal R. Ass'n, 224 U.S. 383 (1922)	7
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	7
Statutes	
A.R.S. §5-108.01	3,9
A.R.S. §5-110	3,5

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ARGUMENT

Downs' brief diverts attention from the real point of our petition.

Paragraph one of the Downs-Turf agreement requires these two competitors to both apply for exactly one-half of the available horse racing dates and to take turns applying for the first half of the racing season. Absent the agreement, either could apply for any number of racing dates and any part of the season. Because of the agreement and the statute under which the dates are allocated on the basis

of the private arrangement, even if one of the permitees is clearly superior to the other the dates are not awarded to the best permittee based on competition and, because of the agreement, no more than one-half of the dates could ever be awarded to either permittee.

Turf recognizes that this part of the agreement is wrong and violates the antitrust laws. It is willing to take its chances in open competition that it might be awarded more days than the one-half allocated by the private agreement. Downs wants the continued protection of the agreement so that, for the next thirty-four years, it will be guaranteed that its competitor, Turf, will never apply for more than half of the dates and will apply for the first half of the season only every other year.

Downs' argument that the agreement is necessary to set the terms of a simple lease is disingenuous. The lease could easily provide rental terms for whatever number of days the State granted to Downs or any other permittee. Instead, it divides the racing season between these two competitors. True, both racing operators cannot use the same facility at the same time. But that does not mean that they must agree up to 60 years in advance on how often each operator is to use it, and on what dates, when either the market or a racing commission is available to make that determination on the basis of competitive merit.

This horizontal market division is a classic *per se* violation of federal antitrust law not excused as state action. The Court of Appeals decision to the contrary is in direct conflict with decisions of this Court and other circuits.

I. ARIZONA STATUTES DO NOT MEET THE STATE ACTION REQUIREMENT OF "COMPULSION" BECAUSE THEY DO NOT COMPEL PRIVATE PARTIES TO ACT ANTICOMPETITIVELY.

Downs chooses not to defend in its brief the holding of the Court of Appeals that compulsion is not required for state action exemption of private conduct. Instead, Downs points to the word "shall" in a repealed statute, A.R.S. §5-108.01, as evidence of compulsion. Downs' Brief at 16, n.5.

But that statute said only that "applicants shall *attempt* to resolve each conflict [in racing date applications] by agreement . . ." A.R.S. §5-108.01(B) (emphasis added). The statute may have encouraged negotiation, but it did not compel agreement. Even if the statute were viewed as compelling parties to agree to allocate racing dates, it contemplated agreement only "[i]n the event of a conflict" in applications for a current racing season. That mandate did not require an agreement effective prior to filing any applications with the commission and which spans sixty years.

Moreover, as noted, A.R.S. §5-108.01 has long since been repealed. It was replaced by A.R.S. §5-110, which contains no mandate to racing operators. The current statute merely accepts the privately agreed allocation by giving a "preference" to historically allotted dates. The new statute has no feature which compels private anticompetitive conduct. Nor is any "active supervision" conducted of the dates reached by agreement, since dates set by agreement are now frozen by the preference scheme of A.R.S. §5-110.

Downs also argues that state action immunity in this case does not conflict with the decisions in other circuits, quoting statements in two cases that the state had no clearly expressed policy for its law. Downs' Brief at 17, n.6. Downs misses the point. Turf had cited these cases and those of three other circuits in its Brief at 16 to show that the Courts of Appeals read this Court's decisions as requiring

compulsion. Only the panel of the Ninth Circuit in this case finds no such requirement.[1]

The continuing vitality of the compulsion requirement was recently challenged in *United States v. Southern Motor Carriers Rate Conference*, ____ F.2d ____ (5th Cir. No. 79-3741, April 5, 1982). Relying solely on the same decisions of this Court in which Judge Sneed could find no compulsion requirement, and upon the Ninth Circuit's opinion in *Ronwin v. State Bar of Arizona*, 663 F.2d 914 (1981), the Fifth Circuit concluded that compulsion remains a necessary element of the state action exemption. The court specifically rejected the notion that the compulsion requirement was eliminated by enunciation of the state action test in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Court of Appeals then held that the challenged anticompetitive conduct was not immunized because the statutes involved did not compel the conduct. The decision in this case and the Fifth Circuit's decision are in direct conflict. Moreover, the decision here would establish a rule contrary to this Court's decisions in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

Arizona neither compels the anticompetitive conduct at issue nor actively supervises it. Downs claims that §5-110(A) constitutes "active supervision of the allocation of racing days." Downs' Brief at 16-17. This is a dramatic departure from the basis of the holding below, which was that Arizona's lack of supervision of racing dates was irrelevant in light of the general supervision of horse racing in Arizona's "integrated regulatory scheme." 670 F.2d at 825. Of course, general supervision is insufficient to show that the specific anticompetitive conduct is immunized. The Ninth Circuit's judgment that general supervision is enough runs counter to

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[1] *Compare* the opinion of the Court of Appeals in this case *with Phonotele, Inc. v. American Tel. & Tel. Co.*, ____ F.2d ____, 1981-2 Trade Cas. (CCH) ¶64,413 (9th Cir. Dec. 3. 1981) *and Ronwin v. State Bar of Arizona*, 663 F.2d 914 (9th Cir. 1981) (applying compulsion test).

this Court's decisions in *Medical*, *Goldfarb* and *Cantor*. The singular statute affecting racing dates, §5-110, does not require that the commission examine either the merits of an agreement to allocate dates or the merits of a particular application based on an agreement. Instead, the statute awards dates on an historical basis. In the case of Downs and Turf, dates historically were determined by their agreement. The earlier statute which authorized the agreement, §5-108.01, also had no provision for examining the agreement to determine whether it furthered state policy. Arizona thus does not actively supervise the anticompetitive conduct in this case.

II. IN THIS PER SE CASE, DOWNS' CHARACTERIZATION OF THE PURPOSE OF THIS ACTION IS IRRELEVANT.

Without the benefit of evidence, and without material purpose,[2] Downs asserts that Turf's intention is to "eliminate Downs as a competitor." Downs' speculation should

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[2] Downs' argument is at best conceivably material to a rule of reason analysis. But this case presents an alleged *per se* violation in which a detailed inquiry into the particular circumstances of the industry is irrelevant. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). Such an inquiry defeats the purpose of the *per se* rule.

In the same breath, Downs asserts that Turf has abandoned any rule of reason claim. Downs' Brief at 5-6. The portion of the record to which Downs cites is its own memorandum in the trial court. This was the final memorandum filed on the cross-motions for summary judgment, and Turf had no opportunity to respond. Downs' argument mischaracterizes the events and posture of this action. Turf made no attempt to prove a rule of reason claim because it had no occasion to do so. Turf's own motion was for partial summary judgment only, limited to whether paragraph one of the agreement was a *per se* violation. Downs' cross-motion did *not* argue that there was no violation under the rule of reason. Downs characterized its own motion in this way: "Downs is entitled to judgment in its favor as a matter of law under the grounds that this Court lacks jurisdiction over the subject matter of this action, and furthermore, there are no genuine issues of material fact relating to the affirmative defenses of *in pari delicto*, laches, and *Parker v. Brown* defense." Downs' Cross-Motion for Summary Judgment at 1. Turf simply cannot be said to have "abandoned" its rule of reason claim when the posture of the case did not require that the matter be argued.

not be permitted to distract the Court from the real issue in this case: does paragraph one in the Downs-Turf agreement allocating racing dates restrain competition or not?

Even if Downs is correct that Turf's success in this lawsuit would put it in a position to drive Downs from the market, Downs would have all of the remedies of the antitrust laws in the event of impermissible conduct by Turf. The argument that Turf might someday do something which is anticompetitive simply does not excuse Downs' present anticompetitive conduct. Moreover, the courts avoid solicitude toward individual enterprises, for the concern of the antitrust laws is with "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).[3]

All Turf seeks to do is reopen the process of allocating racing dates so that the State can allocate them in the amounts, at the times and to the permittees who will conduct the best racing for the benefit of the State and the public. In any event, Downs has sounded a false alarm. Its fear depends upon two assumptions: (1) the entire Downs-Turf agreement will be voided by this action, and (2) Turf will either not enter into a new lease with Downs or will dictate terms so onerous that Downs cannot survive.

The extent to which the agreement must be voided to eliminate its anticompetitive aspects is still an undecided question.[4] The issue is one which may affect the scope of a remedy, but does not disprove the existence of a violation.

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[3] If Downs' continued existence as a competitor depends upon its continued protection from competition, the departure of Downs from the marketplace cannot be mourned.

[4] The courts below did not rely on the language in the agreement cited in Downs' brief at p. 8, n. 3, as being a "non-severability clause." Moreover, the language cited refers only to the parties' obligations under paragraph 14, not to the date allocation of paragraph 1 or the other provisions of the agreement. Most importantly, the Arizona Supreme Court held that this agreement's provisions are severable. *Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 637 P.2d 1053 (1981).

Even if the agreement is voided in its entirety, Downs' fears are unfounded. First, Turf repeatedly represented to the courts below that it would make its facility available to Downs and others.[5] Second, the antitrust laws may require as much. *See United States v. Terminal R. Ass'n*, 224 U.S. 383 (1922) (essential facility must be shared). Third, it would be against Turf's economic interests to exclude Downs or impose impossible terms. If the Arizona Racing Commission makes racing dates available to Downs, the facility would remain idle rather than generate revenues for Turf unless Turf opened the facility to Downs.

Downs argues that *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), authorizes its inquiry into the effect and purpose of the Downs-Turf agreement. Downs' Brief at 19-20. However, *Broadcast Music* involved a blanket license for performance of copyrighted music, a practice never before examined by the Court, and, hence, not one in which the Court had sufficient experience to classify as a *per se* violation. 441 U.S. at 9-10.[6] In contrast, the Court is already familiar with, and has classified as *per se* violations, horizontal allocations of markets. *E.g., United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

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[5] If the provisions are severable, the Downs-Turf agreement requires just that. The third sentence of paragraph 1 assures Downs' use of the facility for whatever dates are allocated by the racing commission. Turf's Appendix at A-32.

[6] Moreover, the licensing agreements challenged in *Broadcast Music* were found necessary to implement a clear congressional policy of protecting the rights of copyright owners. 441 U.S. at 10. The agreements were also a practical necessity of the copyright marketplace. 441 U.S. at 20. In the absence of the agreements, individual composers could not effectively compete. 441 U.S. at 22-23. Finally, the conduct of the defendants was already carefully restricted and monitored by the federal executive and judiciary. 441 U.S. at 13. None of these conditions characterize the present case.

Downs' accusations should not distract the Court from the real issue: Is paragraph one of the agreement a *per se* violation?

III. *ARIZONA DOWNS V. ARIZONA HORSEMEN'S* NEITHER PURPORTS TO DECIDE NOR HAS DECISIVE EFFECT ON THE FEDERAL ANTITRUST QUESTIONS IN THIS CASE.

No federal antitrust questions were presented in the state court action filed after this action began. Downs is incorrect in asserting that the state court action is "identical" to this one and requires a result favorable to Downs. See Downs' Brief at 12 *et seq.* Decision of state law questions are obviously not dispositive of federal questions.[7] The Supremacy Clause does not permit federal law to be dictated by decision of state law issues.

Thus, the state law question of whether a specific racing statute should prevail over a general antitrust statute, 637 P.2d at 1062, does not govern the federal issues in this case: is allocation of racing dates a *per se* violation of federal antitrust law and is a state's authorization of the allocation intended by Congress to be exempt from the federal antitrust laws?

IV. THE ASSERTED STATE POLICY AGAINST "CONCURRENT RACING" DOES NOT SUPPORT AN ANTICOMPETITIVE PRIVATE AGREEMENT TO ALLOCATE RACING DATES.

Downs contends that the Court of Appeals held that the State's regulation furthered a policy of "assur[ing] continuity of business and prohibit[ing] concurrent racing." Downs' Brief at 17. Not only did the Court of Appeals *not* so hold,

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[7] The Arizona Supreme Court thought it "significant" that state and not federal antitrust claims were presented to it. 637 P.2d at 1062, n. 3. However, the court, while deciding that the specific racing statute prevailed over the conflicting state antitrust laws, noted: "Generally, provisions such as that contained in the 1956 lease would constitute a violation of the antitrust statutes . . ." 637 P.2d at 1062.

but there is no evidence that such policies exist. Even if they did exist, these asserted policies would not support the challenged agreement.

The court actually held that §5-108.01 evidenced a "stated policy of the Arizona Legislature that conflicts in the dates be settled by the private parties and not by the Commission." 670 F.2d at 824. It also believed that the totality of racing statutes articulated a general policy to replace competition with regulation. 670 F.2d at 825. However, had the State wanted to regulate racing dates, it would have done so and not left the matter to private agreement. If the State had wanted to compel private agreement, §5-108.01 would have done so rather than requiring a mere "attempt" to agree. And in the absence of close supervision, allowing private anticompetitive agreements to supplant regulation is no more than an abdication of public decision-making responsibility to private parties. This is clearly insufficient to constitute state action. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 (1976) (substantial private role in decision-making precludes state action immunity); *Midcal, supra* (law compelling private parties to file binding fair trade contracts or price schedules not immunized).

The Court of Appeals did not rely on state policies favoring business continuity or disfavoring concurrent racing. Nor is there any clear articulation of such policies. Although the Arizona Supreme Court has had every reason and opportunity to announce such policies, it has not done so.[8]

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[8] In *Arizona Downs v. Arizona Horsemen's Foundation*, the Arizona Supreme Court found that state regulation is supported by the state's interest in "protection of its revenues and protection of patrons from fraud," 637 P.2d at 1059, and that A.R.S. §5-108.01 serves a policy favoring private resolution of conflicts in date applications. 637 P.2d at 1063.

Even if a policy against concurrent racing existed, it would not support private allocation of racing dates. Downs claims that such a policy means that only one race can be held at a time. This is true, but the real question remains: who is to conduct races on which days? It is the competition for racing dates that is eliminated by paragraph one of the agreement. The asserted policy against concurrent racing is served whether Downs conducts races on two-thirds of all racing days and Turf races on the other third, or one-half for each pursuant to the agreement or in any other proportion. The anticompetitive allocation of racing dates is not supported by a policy against concurrent racing. This policy is achieved equally well by permitting Downs and Turf to compete on the merits for racing dates before the racing commission.

CONCLUSION

The holding of the Ninth Circuit Court of Appeals is in conflict with this Court's decisions, as well as those in other circuits. Moreover, the circuit court's holding seriously undercuts the federal antitrust laws. The issues in this case are important and substantial. This Court's review is, therefore, necessary and proper.

For these reasons, Petitioner Turf Paradise, Inc. respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

JON L. KYL
JEFFERSON L. LANKFORD
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Tel. (602) 262-5911
Attorneys for Petitioner